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101st Congress *2d Session*	SENATE	Report 101-381

CABLE TELEVISION CONSUMER PROTECTION ACT OF 1990

Mr. Hollings, from the Committee on Commerce, Science, and Transportation, submitted the following

REPORT

together with

ADDITIONAL VIEWS

OF THE

SENATE COMMITTEE ON COMMERCE, SCIENCE, AND TRANSPORTATION

ON

S. 1880

July 19 (legislative day, July 10), 1990.—Ordered to be printed

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[To accompany S. 1880]

The Committee on Commerce, Science, and Transportation, to which was referred the bill (S. 1880) to amend title VI of the Communications Act of 1934 to ensure carriage on cable television of local news and other programming and to restore the right of local regulatory authorities to regulate cable television rates, and for other purposes, having considered the same, reports favorably thereon with an amendment in the nature of a substitute and recommends that the bill as amended do pass.

Purpose of Bill

The legislation in general provides for additional governmental oversight of the cable television industry. It revises the existing rate regulation provision in title VI of the Communications Act of 1934 (the Act) by (1) requiring that the Federal Communications Commission (FCC) (and in certain instances franchising authorities) ensure that rates for basic cable service (including equipment used to receive such service) are reasonable, and (2) requiring that the FCC ensure that rates for other cable programming services (not offered on a per channel or per program basis) are not significantly excessive. The legislation also requires the FCC to ensure that cable television subscribers have adequate customer service, cable systems meet minimal technical standards of operation, and leased access channels are offered to programmers at reasonable rates, terms, and conditions.

The legislation bars national cable programmers who are owned or controlled by cable operators from unreasonably refusing to deal with other video distributors. It prohibits such cable programmers from discriminating in prices, terms, and conditions, if such action would have the effect of impeding retail competition. Such vertically integrated programmers also shall make their programming available to cable operators and buying agents of cable operators on similar price, terms, and conditions, provided, however, that reasonable cost-related factors may be taken into account. In addition, cable operators cannot discriminate against unaffiliated programmers or require a financial interest in video programming as a condition of carriage. Any cable programmer who scrambles satellite delivered programming (C-Band) is required to make that programming available to home satellite dish owners.

The legislation requires that the FCC establish within one year reasonable limits on the number of subscribers that can be controlled by a cable operator and on the number of channels on a cable system that can be occupied by a cable programmer owned by a cable operator. It also limits the ownership of competing video distribution systems by cable operators, and in certain instances, by other video distributors.

The legislation requires that cable systems carry local television broadcast signals according to specific requirements (the so-called "must-carry" provision). Finally, the legislation limits the liability of franchising authorities for claims under the Civil Rights Acts asserting a violation of First Amendment rights; modifies selected procedural requirements in the renewal section of title VI of the Act; and gives the FCC the authority to require that television set manufacturers include equipment permitting users to switch easily among video distributors.

BACKGROUND AND NEEDS

THE 1984 CABLE TELECOMMUNICATIONS ACT

> The Communications Act of 1934 . . . was enacted well before the advent of cable television. As a result, there has never been a national policy to guide the development of cable . . . [This bill] establishes a national policy that clarifies the current system of local, state and Federal regulation of cable television . . .[1]

Until the 1984 Act, there was no Federal policy for cable television. The FCC had only indirect authority to oversee the cable industry, which it obtained by virtue of its obligation to ensure that broadcasters served the public interest. About a dozen States had laws in effect controlling certain cable activities, and in those states where no law existed, the cities and other local government entities exercised control because cable systems had to pass through public rights of way. As a result, the cable industry was subjected to a crazy quilt of regulation, often to its detriment and to that of the subscriber.

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[1] Committee on Energy and Commerce, *Report on the Cable Franchise Policy and Communications Act*, House Report 98-934, p. 19.

The 1984 Act changed this cable landscape significantly, adding title VI to the Communications Act of 1934. It defined more precisely the roles of each governmental entity. The State or local authorities continued to regulate rates in the absence of effective competition and to control the franchising process but under new constraints. The Federal Government controlled basic rate deregulation and technical standards. The 1984 Act‘s major provisions are as follows:

—Rates for basic cable service would be regulated by franchising authorities in the absence of effective competition, as defined by the FCC (section 623).

—Franchise fees shall not exceed five percent of the cable system's gross revenues (section 622).

—State or local governmental entities will control the franchising process, including the number of franchises to award (section 621), but are constrained in the obligations that can be imposed on cable operators (sections 624 and 625).

—Franchising authorities may require cable systems to set aside channels for public, educational, and governmental use (section 611).

—Cable operators are required to set aside a certain number of channels for commercial use by persons unaffiliated with the cable operator (section 612, the so-called "leased access" provision).

—Standards and procedures are established for the franchise renewal process which first require a determination on whether the existing franchise should be renewed prior to considering competing applications (section 626).

—Codifies the FCC's rules prohibiting broadcasters from owning a local cable system and prohibiting telephone companies, except in rural areas, from owning a local cable system (section 613).

In sum, the 1984 Act provided the cable industry with the potentail to develop its systems and its programming. Actions by the FCC to implement that Act further freed the industry from regulation, giving it the certainty to increase capital expenditures.

The 1984 Act has achieved many of its objectives. Over the past six years, the cable industry has grown dramatically. Most of America is now wired to receive cable; almost 90 percent of the homes in the country are passed by cable systems, and over 60 percent of these homes subscribe to cable service. System capacity has increased; the average cable system offers about 36 channels, and this number is steadily increasing. Programming choices have also grown about 50 percent since the 1984 Act was passed, with many more offerings now being planned. Cable television has become our nation's dominant video distribution medium.

CABLE INDUSTRY [2]

[Numbers in millions]

	1989	1988	1987	1986	1985
TV households	90.2	88.6	87.4	85.9	84.9
Homes passed	80.3	77.2	73.1	69.4	64.7

CABLE INDUSTRY [2]—Continued

[Numbers in millions]

	1989	1988	1987	1986	1985
Pay units	41.9	38.8	34.8	32.1	30.6
Basic subs	49.4	45.7	42.6	39.7	36.7

With this growth have come problems. In certain instances, rate increases have been excessive. For many systems, customer service has been abominable. Programmers have argued that they cannot get carried on cable systems without relinquishing control of their product. In addition, competing video distributors allege that these programmers refuse to deal with them. In general, it is argued that the cable industry now possesses undue market power which is used to the detriment of consumers, programmers, and competing video distributors. It is this concern that is addressed in this legislation.

CURRENT PROBLEMS IN THE CABLE TELEVISION MARKETPLACE

S. 1880, the Cable Television Consumer Protection Act, was introduced by Senator Danforth, the Committee's Ranking Republican Member, on November 15, 1989, in response to concerns voiced by subscribers, programmers, competitors, and franchising authorities. The legislation was cosponsored by Senators McCain, Hatch, Gore, Ford, Lieberman, Lott, Warner, Burdick, Pryor, Gorton, Burns, Metzenbaum, Bumpers, and Pressler. The Committee held two hearings on the bill and the Committee staff draft substitute (authorized for release by Senators Hollings, Inouye, and Danforth).

In all, the Committee has held ten days of hearings on cable and cable-related issues in this Congress. Three hearings were held in June 1989 on the issue of competition in the video programming industry. Much of the testimony received by the Committee addressed the question of the market power of cable operators. On October 18, 1989, the Committee held a hearing on cable advertising directed toward children. On October 25, 1989, the Committee held a hearing on the issue of cable carriage of local broadcast stations and in November 1989 held an oversight hearing on the 1984 Act. In March 1990, the Committee held a hearing on the FCC's reestablishment of the rules permitting television broadcasters to obtain exclusive rights in syndicated programs (the syndicated exclusivity and network non-duplication rules). Through its hearings, the Committee has also reviewed the following measures:

S. 168, the Cable Television Programming Competition and Consumer Protection Act, introduced by Senator Pressler;

S. 833, the Cable Television Subscriber Protection Act, introduced by Senator Metzenbaum;

S. 905, the Cable Consumer Protection Act, introduced by Senator Lieberman; and

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[2] The source of this data is Paul Kagan Associates. This chart can be found in Time Warner's 1989 Annual Report, p. 29. The firm of A.C. Nielsen has also compiled statistics on the state of the cable industry. These differ somewhat from the Kagan statistics. For June 1990, Nielsen states that there are 92.1 million television households, that 73.9 million of these homes have access to cable, and that 53.2 million subscribe.

S. 1068. the Cable Competition Act, introduced by Senator Gore.

The following sections examine the concerns of subscribers and programmers and the overall issue of market power in the cable television industry.

Cable's Market Power and Subscribers: Rates

The 1984 Act provided that rates for basic cable service [3] would be deregulated where there was effective competition to the cable system. This provisions took effect immediately for new franchises and two years after the date of enactment for existing franchises (December 29, 1986). The FCC was directed to conduct a proceeding to define when effective competiton exists.

The Commission completed this proceeding in April 1985, and it concluded that a cable system is subject to effective competition if its subscribers can receive three over-the-air broadcast signals.[4] The effect of this standard was to deregulate cable rates for 97 percent of all systems. As noted above, this standard took effect at the end of 1986, even though the Commission's decision was taken to court.

The U.S. Court of Appeals (D.C. Circuit) generally upheld the Commission's decisions.[5] However, the court ordered the FCC either to (1) provide additional support for how it was to determine whether these over-the-air signals were generally available, or (2) develop a new standard. The Commission chose the first of these options and issued a new decision in March 1988 altering its method for determining when television signals are generally available.[6] (The FCC recently opened a proceeding to reconsider this standard.[7]

Subscribers have lived with deregulation for over three years. Because of the many claims that the cable industry has used its market power to abuse this freedom, the chairman of the House Telecommunications Subcommittee, Congressman Markey, requested that the General Accounting Office (GAO) survey cable systems to determine how quickly basic cable rates have risen. This report was completed in August 1989.

Because of the large number of cable systems (about 9000), the GAO was not able to obtain information from every system. It sought data from a representative sample of some 2000 systems. Of the systems surveyed, about 75 percent responded. From these responses, the GAO found:

> [T]hat, from December 1, 1986, through October 1988, monthly rates for the lowest priced basic service increased by 29 percent, from an average of $11.23 to $14.48 per subscriber.

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[3] The tier of service that includes retransmitted local television signals.

[4] *Report and Order*, MM Docket 84-1296 (May 2, 1985).

[5] *American Civil Liberties Union v. FCC*, 823 F.2d 1554 (D.C. Cir. 1987), *cert. denied*, 108 S.Ct. 1220 (1988).

[6] *Second Report and Order*, MM Docket No. 84-1296 (1988).

[7] The Commission may adopt a decision in this proceeding (MM Docket 90-4) sometime later in July, 1990.

> This rate was accompanied by an increase in the average number of basic channels offered (from nearly 24 to about 30).
>
> By comparison, monthly rates for the most popular basic cable service [that is, the one to which most people subscribed] increased by 26 percent, from an average per subscriber of $11.70 to $14.77. This increase was accompanied, on average, by an increase in the number of basic cable channels offered (from nearly 27 to about 32). . .
>
> Average monthly rates, per system, for movie premium services decreased, both for three popular individual channels and for combinations of premium channels.

The GAO survey was extensively discussed at the Committee's hearings. Many Members believed that the rate increase of over 25 percent in about two years was too great and reflected undue market power. They argued that the FCC needed to impose a more stringent effective competition standard, one based not only on over-the-air signals but also on the reception of multichannel video distributors.

The cable industry responded to these statements by claiming that many rate increases were merely the result of "catching-up" for rate freezes that had been imposed by local franchising authorities; and, in any event, the most telling statistic is price per service, which was $.47/month prior to deregulation and $.48/month afterward in the case of the lower priced basic services. In other words, the industry argued that cable service remained a good value.

While these arguments may have some merit, it is important to note their shortcomings, as well as problems with relying on the GAO survey.

First, many Members wondered whether the GAO survey actually understand the rate increases because (1) the systems with large increases did not respond to the survey; and (2) the systems with no significant increases not only responded in great number but also many of these systems may have received increases from the franchising authority prior to deregulation. An example of this concern is evidenced by Senator Ford's statements at the November 16, 1989 hearing:

> Senator FORD. And GAO sampled 1,950 of 8,908 cable operators at the time, and they got 499 responses, which was 26 percent—that is, 26 percent responded to the GAO.
>
> Now, I wonder if among those who failed to respond would have been the cable system in Louisville, because their rate increase has gone up 204 percent since 1986 . . .
>
> Well, you just go down through the list: Ashland, 94 percent; Bowling Green, 123 percent; Hazard, 131 percent; Louisville, 204 percent; Madisonville, 95 percent.
>
> Now that's my State. That's right in my back door.
>
> And you come in here and tell us that it's an average of 20 percent or 26 percent. Why it's just not here when you get right down to it in my particular State.
>
> Now how in the world can you take 1,950 and get 499 that fail to respond out of that, and those are voluntary

> responses, and I doubt seriously that there was an audit. There were very few audits.
>
> Then we come in here and you're telling us that it's 95 percent accurate.[8]

There is little doubt that while the GAO report has some value, it is not definitive. It is for this reason that analysis of additional evidence presented at the hearings is important. The following are statements of several witnesses:

> Basic service rates in Newark, in fact, increased by more than 130 percent since FCC deregulation at the end of 1986. (Sharpe James, Mayor, City of Newark, NJ)[9]
>
> Up until early 1988 we were receiving 17 basic channels of service for the price of $14.95. Shortly after Essex was purchased in mid-1988 by a cable group called Multivision, our local cable rates increased by about 40 percent, and with absolutely no additional channels or improvements to service. (Eddy Patterson, Mayor, City of Henderson, TN)[10]
>
> In the 16 years prior to deregulation, Hawaii's systems enjoyed reasonable profits and a statewide penetration rate in excess of 70 percent, while 99 percent of Hawaii's residents were able to receive the best available cable technology.
>
> Rate deregulation in 1986 upset this balance. Since then, cable rates have risen geometrically for most of Hawaii's consumers and most of Hawaii's systems have been sold to large multiple-system operators. For consumers living in systems which have been churned, sold two or three times in the last three or four years, rates have risen by as much as 99 percent. (Robert A. Alm, Department of Commerce and Consumer Affairs, Honolulu, HI)[11]
>
> Monthly charges for basic service in Jefferson City [Missouri] have risen from $6.55 in 1981 to a cost as of May 1, of $21,45. In the last 3½ years cable rates have increased 186 percent. (Allen Garner City Counselor for Jefferson City, MO)[12]

It is clear from these statements and from other evidence gathered by the Committee that (1) for the past several years the average rate across the country has increased several times greater than the rate of inflation, and (2) rates in certain locations have increased dramatically, such that subscribers question whether they are being gouged by cable operators.

On June 13, a week after the Committee ordered this legislation reported, the GAO released its most recent survey of cable rates.[13]

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[8] *Oversight of Cable TV*, Hearing Before the Subcommittee on Communications of the Committee on Commerce, Science and Transportation (101-464), November 16 and 17, 1989, p. 156.

[9] *Oversight of Cable TV*, p. 188.

[10] *Oversight of Cable TV*, p. 218.

[11] *Oversight of Cable TV*, p. 223.

[12] *Cable TV Consumer Protection Act*, Hearings Before the Subcommittee on Communications of the Committee on Commerce Science and Transportation (101-), March 29 and April 4, 1990, p. 245.

[13] General Accounting Office, Report to the Chairman, Subcommittee on Telecommunications and Finance, Committee on Energy and Commerce, House of Representatives, "Follow-up on National Survey of Cable Television Rates and Services" (GAO/RCED-90-199), June 13, 1990.

The GAO concluded that the rates for the lowest priced, most popular basic services increased by an average of 10 percent in 1989. While this is lower than increases for previous years, it is still twice the rate of inflation. Since deregulation (about three years ago), the average monthly rate for basic service has increased by about 40 percent. Thus, cable rates increases, while moderating somewhat, are continuing to rise significantly. (The GAO report is based on a survey of 1,971 cable systems constituting about 60 percent of cable's subscribers.)

To this evidence should be added indications of where rates are headed.

In the late 1980's, cable systems were selling for greater and greater amounts; the average sales price was increasing each year by hundreds of dollars per subscriber. In 1989, systems were regularly selling for well over $2,000 per subscriber, and some systems were selling as high as almost $3,000 per subscriber.[14] By determining the amount of debt involved in these transactions—which for the cable television industry can be a large percentage of the amount invested [15]—it is possible to make rough approximations as to the cash flow needed to service this debt and what rates need to be to generate this cash flow. At the selling prices in 1989, it was evident that, at the very least, rates were likely to continune to increase to cover the debt load, and that by the end of this decade, basic cable rates on average could be as high as $50 per subscriber, far more than double today's average rate.[16] It must be noted that these calculations are based on actual marketplace transactions; investors bought systems believing they could raise rates to cover debt. Consequently, these calculations must be taken seriously.

One further factor needs to be included in analyzing rates in the cable television industry to determine whether operators are reaping undue revenues. The cable industry, like many other communications industries, is generally characterized by relatively high fixed costs.[17]

Communications industries' fixed costs as a percent of total costs (approximate)

Film production	95
Cable operation	85
Publishing	80
Radio	75
Cable programming	65
Newspapers	65
Magazines	55
Film distribution	[18] 55

The significance of a high fixed cost is that most of the cost is incurred up front. That mean that revenues—but not costs—will grow greatly as cable subscribership grows. It is thus wrong to evaluate cable's rates simply by determing whether there have been large rate increases. One might expect that rates would be constant or declining as the industry grows. As can be seen by the evidence, that has not been the case.[19]

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[14] *See*, Chart elsewhere in this section.

[15] According to Paul Kagan Associates, outstanding cable television debt has increased from over $25 billion at the end of 1987 to almost $37 billion at the end of 1989. The cable television industry is generally considered to be highly leveraged with debt financing.

[16] *See, The Cable Insutrry, Reregulation and its Impact on Valuction, Barry A. Kaplan, Goldman Sachs, January 1990.*

[17] *See*, Testimony of John Malone, *Oversight of Cable TV*, p. 127.

[18] These date were gathered by the management consultant firm, McKinsey & Co., and were published in *The Economist*, December 23, 1989, p. 4 of the Survey on the Entertainment Industry.

The Committee thus has before it evidence about historical and projected rate increases and cable being a high fixed cost industry. In combination, this evidence provides the Committee with significant and legitimate reasons to be greatly concerned that subscribers, in a deregulated marketplace, would be at the mercy of a cable operator's market power. At-the same time, the Committee recognizes that rates are only one indicator of market power. The Committee's examination thus went into greater depth and considered other factors.

The FCC is conducting two proceedings that examine market power in the cable television industry.[20] The filings from the various parties in these proceedings have proven very useful for the Committee in its inquiry. The information sheds further light on cable operators' market power.

The FCC's existing standard for determining whether there is effective competition to cable systems is: Can subscribers receive three over-the-air local television signals? While that standard may have been appropriate when adopted, it certainly is not today. Many commenters in recent FCC proceedings have argued that this standard does not reflect current market conditions and that some multichannel competitor is required. Even the National Cable Television Association (NCTA) in its submission argued that a greater number of over-the-air signals, five, is the proper standard.[21]

The NCTA's argument is based on a study commissioned by the NCTA written by James Dertouzos of the Rand Corporation and Steven Wildman of Northwestern University. It concluded, "[F]ive broadcast signals are sufficient to achieve the maximum competitive effect. Additional signals beyond five have no discernible effect on the behavior of cable operators." [22] It is important to note that this statement does not say that five signals constitute effective competition, only that they give "the maximum competitive effect." The NCTA recognized this, but it then went on to rely on other studies of dubious quality [23] to reach the conclusion that with five signals, effective competition will exist.

Another method of determining market power and the proper standard for effective competition is to examine the ratio of market value of a company to the replacement cost of the assets. (This is known as Tobin's Q. If the ratio is greater than one, it indicates the presence of market power.) This test was alluded to by the Chairman of the FCC in his November 17, 1989, testimony before the Committee:

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[19] It should be noted that the cable industry disputes the premise that it is a high fixed cost industry. It argues that its costs change greatly over time.

[20] *Reexamination of Effective Competition Standard for the Regulation of Cable Television Basic Service Rates*, MM Docket 90-4; *Competition, Rate Deregulation and the Commission's Policies Relating to the Provision of Cable Television Service*, MM Docket 89-600.

[21] *See*, Comments of the National Cable Television Association in MM Docket No. 89-600, March 1, 1990.

[22] "Competitive Effects of Broadcast Signals on Cable", February 22, 1990, p. 2.

[23] The NCTA principally relied upon a 1989 study by Adam Jaffee and David Kanter for the Harvard Institute of Economic Research. For a description of the deficiencies in this study see the April 2, 1990 comments of the Department of Justice to the FCC, pages 24-25. It should also be noted that the data in this study does not include sales in 1988 and 1989, when selling prices for cable systems increased substantially.

> I think the monopoly position that the cable providers have enjoyed has inflated dramatically the per subscriber value.
>
> I am told that maybe a national average per subscriber for putting in the system is about $400, and these franchises are trading something in excess of $2,000 per subscriber. So, it strikes me that is kind of the premium the market places on having that monopoly position.[24]

It is clear that throughout the 1980's the selling prices of cable systems (on a per subscriber basis) tripled:

	Value/Subscriber
1981	$793
1982	918
1983	998
1984	919
1985	1,003
1986	1,349
1987	1,734
1988	2,010
1989	[25] 2,328

While prices have risen greatly, the cost of building a cable system along with programming costs have not increased proportionately. Data submitted to the FCC by Paul MacAvoy (on behalf of the U.S. Telephone Association) give a replacement value of less than $500 per subscriber.[26] In testimony to the Committee, Gene Kimmelman of the Consumer Federation of America, states this value is between $600 and $1000 per subscriber.[27] The Committee also received information from Continental Cablevision at a seminar on April 11, 1990, that the replacement cost varied between high density systems (about $500–$700 per subscriber) and low density systems (about $1,500–$2,000 per subscriber). From these data, it is evident that while there are discrepancies, the selling prices far exceed the replacement value.

On this basis, Paul MacAvoy,[28] in the above cited study, estimated a Q ratio for the cable industry of 4.3 as of late 1989. Even if this ratio is somewhat inflated, it indicates the presence of significant market power in the cable industry.

The NCTA submitted a study by Sanford Grossman, "On the Misuse of Tobin's Q to Measure Monopoly Power" [29], that strongly disputes this conclusion. Professor Grossman alleges that this ratio is virtually meaningless in determining market power for the cable industry because of problems in calculating the Q value, the fact that this value does not account for intangible assets, and a variety of other reasons.

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[24] *Oversight of Cable TV*, p. 361.

[25] The source of these data is Paul Kagan Associates. So far in 1990, prices have dropped about 20 percent. An April 2, 1990 article in *Cable World* (p. 36) attributes this drop to "a crunch in the financial markets" coupled with "regulatory uncertainty".

[26] *See*, "Tobin's Q and the Cable Industry's Market Power", Paul MacAvoy, pp. 21–24.

[27] *Oversight of Cable TV*, p. 404.

[28] Dean MacAvoy is the Dean and John M. Olin Professor of Public Policy and Business Administration at the William E. Simon Graduate School of Business Administration, University of Rochester. This study was published on February 28, 1990.

[29] Professor Grossman is the Trustee Professor of Finance at the Wharton School, University of Pennsylvania. This study was published on February 26, 1990.

The Department of Justice, on the other hand, believes that the Q ratio has some applicability in determining cable's market power. In submitting comments to the FCC on April 2, 1990, the Department stated:

> Clearly, the Q ratios for the cable industry discussed above are subject to some dispute. However, given the magnitude of the Q ratios, and the likely size of any corrections that should be made to them, it is likely that the Q ratios for cable firms are greater than should be expected in industries subject to effective competition. Therefore, these studies provide some support for the conclusion that cable firms possess some degree of local market power.[30]

The Department then goes on to analyze other studies involving market power in the cable industry, including NCTA's Dertouzos and Wildman study. It then concludes:

> The information before the Commission suggests strongly that neither conventional television broadcast nor any of the alternative technologies presently available are close enough substitutes for basic and pay cable television services to prevent the providers of such cable services from exercising some degree of market power. However, the existence and extent of this market power may vary considerably in local cable markets depending, among other things, on the number and quality of over-the-air television signals available to the community and the number of non-local channels of information and entertainment made available over the cable system. In areas that do not receive clear television signals, the ability to provide clear television signals would, by itself, give the local cable system some degree of market power. Since 1984, however, basic cable tiers have been expanded to carry many channels of non-local programming. Even where consumers get good over-the-air television reception, the ability to provide a relatively large number of non-local signals is likely to give the only provider of such services some degree of market power. That market power may be derived to provide the type of programming currently offered on the basic service tier as well as its ability to provide pay cable services, for there does not appear to be a close substitute for either type of cable services.[31]

It is thus clear that the current FCC standard for determining whether effective competition exists is out of date. Moreover, the evidence demonstrates that while some number of over-the-air television signals does constrain the market power of cable systems, some further video competition is required. That conclusion is not surprising in light of changes in the video distribution marketplace.

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[30] Reply Comments of the United States Department of Justice in MM Docket No. 89-600, p. 23.

[31] Comments of the Department of Justice, pp. 2-3.

When the Commission adopted its effective competition standards, the three television networks (and their local affiliates) had close to 80 percent of the prime time market. Today, they have about 65 percent, and further decreases are likely. In a speech on May 7, 1990, Ted Turner, a major cable programmer, said that he believes the three networks will continue to lose market share and that the cable industry will soon match the networks in providing funding for original programming.[32] Further evidence to support this conclusion can be seen, for example, in the page 1 headline in the March 12, 1990 "Multichannel News", "Basic Viewing Passes B'Cast in Total TV Homes". Thus, while over-the-air television may have been effectively competitive with cable in 1985, it has lost a significant amount of market power.

Based on this evidence, many local cable operators possess market power in varying degrees. Operators with a penetration level of less than 30 percent may have no real market power; those with 90 percent penetration are certain to have considerable power. The Committee believes that the effective competition test needs to be altered to reflect this reality. It believes that the best test for effective competition is: whether a sufficient number of over-the-air television signals and a viable multichannel video competitor exist. Because the Committee prefers competition to regulation, and because regulation imposes costs (which may be significant), the Committee examined whether new entry could remedy cable's market power, prior to adopting new regulatory measures.

OVERBUILDS

There has been much discussion about whether competition to existing cable systems is likely to come from another cable system operating in the same territory (an overbuild). The Chairman of the FCC mentioned this remedy in his testimony on November 17, 1990:

> The legal monopolizing of franchise territories may be the root of many of the current problems. Requiring at least two providers would address the cause, not just the symptoms.[33]

This view, however, is not shared by many other witnesses before the Committee. John Malone, President and Chief Executive Officer of TCI, stated:

> And I believe that it is not economically viable to sustain two wires into the home providing, essentially, equivalent services. Because all you do there is double the capital cost, double the operating expenses, or raise them by 150 percent and split the revenues in half.[34]

The Department of Justice in its April 2, 1990, comments to the FCC supports this view.[35]

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[32] *See, Multichannel News*, May 7, 1990, p. 19.

[33] *Oversight of Cable TV*, p. 333.

[34] *Oversight of Cable TV*, p. 166.

[35] Pp. 31-33.

Based on the evidence gathered, the Committee concludes that overbuilds will not, with rare exception, provide the necessary competition to control cable's market power. According to information submitted to the Committee by the cable industry, out of over 9,000 cable systems, there are only 53 communities where there is currently some overbuild. In 36 of these, there is the potential for a total overbuild. Further, there are 132 communities where second franchises have been awarded or are under study. However, in 62 communities where the threat of an overbuild once existed, there have been mergers of the two cable systems. This scarcity of overbuilds is to be expected in light of the strong natural monopoly characteristics of cable systems.

MMDS

Multichannel Multipoint Distribution Service (MMDS)[36] is a service created by the FCC in the early 1980's. It provides line of sight microwave signals carrying video programming, sometimes in combination with other technologies. It is possible in some areas to have up to 33 channels on an MMDS system; however, the number of channels, especially in major cities, may be far less.

Today, MMDS systems are operating in 45 communities and have about 350,000 subscribers. There are limitations—both governmentally imposed and marketplace driven—that will likely inhibit significant growth. First, the number of MMDS channels is limited in many areas. Second, the FCC licensing process is taking much longer than predicted. This means that MMDS operators have to challenge established cable operators, rather than being the first to enter a market. The MMDS operators then allege that cable systems have locked up the best programming and without this programming, their future is in jeopardy. This argument was raised at the Committee's hearings by Robert Schmidt, President of the Wireless Cable Association:

> Despite this healthy and promising prognosis, Wireless Cable is still frustrated from reaching its full potential for a very simple reason: Big Cable has an ever tightening grip on the programming we need to serve consumers. Unfortuantely, Wireless Cable still is generally unable to obtain what I call the four crown jewels of satellite television programming—HBO, Showtime, TNT and ESPN . . . Without the ability to offer these most desired programs to consumers, many Wireless Cable systems are unable to get the financial backing necessary to become operational.[37]

While the MMDS industry believes it has the potential to compete with cable throughout the country, the generally held view is that it may only be a niche competitor. This view was stated in the April 20, 1990 comments of the Federal Trade Commission (FTC) to the FCC:

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[36] NNDS operators often call themselves wireless cable.

[37] *Oversight of Cable TV*, p. 436.

> MMDS, for example, is likely to be a poor substitute for a cable system when there are physical obstructions (e.g., hills and tall buildings) that would block the former's signal. Entry by an MMDS might also be affected by regulatory factors. Moreover, because MMDS has a relatively low channel capacity, its attractiveness to consumers as a substitute for cable will depend on the quality (i.e., number and type of channels) offered by the incumbent cable system.[38]

In addition, just a short time ago, the top MMDS operator in the country, Microband, filed for bankruptcy.

MMDS does have the promise in certain markets to become a competitor to cable. However, this success depends upon far too many uncertain factors. It would be unreasonable for the Committee to rely on MMDS to provide the necessary nationwide competition to cable.

BROADCASTING VIA SATELLITE

There are a variety of ways for video signals to be delivered to the home via satellite. About a decade ago, the FCC permitted private homeowners to have "tv receive only" (TVRO) access to satellite transmissions. Today, there are about two to three million homes that own satellite dishes. Those dishes access primarily C-Band satellite transponders and in some instances access Ku-Band transponders. Viewers with satellite dishes receive the same programs sent to cable systems and broadcasters. If that programming is encrypted or scrambled, the programmer controls whether it can be received.

In addition to satellites operating in the C and Ku-Bands, the FCC has also set aside programming for a Direct Broadcast Satellite (DBS) service. While the Commission adopted this service in the early 1980's and licensed a number of providers, to date there has been no DBS service launched. There are some who believe, however, that this situation may soon change.

Earlier this year, a consortium of Hughes Communications, NBC, News Corporation (Ruper~~t Murd~~och), and Cablevison announced that these entities will enter the DBS market in three years with the potential to provide 108 channels nationwide. Unlike the larger satellite dishes needed for C and Ku-Band reception, the DBS signal is higher powered and could be received by one foot dishes. The goal of this venture is to serve 15 million homes by 1995.[39]

Another satellite venture also was recently announced. A group of nine cable operators plan to lease 10 transponders on a Ku-Band satellite. These operators plan to offer 10 channels of service initially, which might include the carriage of superstation signals (retransmitted distant broadcast stations) and pay-per-view programming. While a larger dish than that for reception of DBS will be required, it should only be three feet in diameter.

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[38] Comment of the Staff of the Bureau of Economics and the San Francisco Regional Office of the Federal Trade Commission on FCC MM Docket No. 89-600, p. 13.

[39] *See, Broadcasting*, April 23, 190, p. 48.

In addition to these planned ventures, there are new technologies that will be used in the next generation of C and Ku-Band satellites. These include: higher power transmission, which will mean that smaller dishes are required; and four: one compression technology, meaning that each transponder can send four signals. These innovations will certainly increase the attractiveness of satellite reception.

Despite all of these plans and innovations, it is far from clear that satellite service can provide the necessary competition to cable. Support for the view can be found in a recent trade press story about a speech by Ted Turner and in comments to the FCC of the Depatment of Justice:[40]

> "Multichannel News"—Turner is not too bullish on the prospects for direct broadcasting satellite service. On the recent DBS announcements, Turner said cable currently enjoys a distinct advantage over DBS, and labeled DBS efforts "too little too late" in terms of attempting to siphon viewers from cable.
>
> "If it had started with cable it might have gotten a portion of the cable business," he said.
>
> "If and when the DBS projects get off the ground, Turner said, "70 percent of the country will already have cable." . . .
>
> "With cable, you only have one wire and no antennas," he said. "[With] DBS, you have outside antennas, a descrambler . . . and you need a live-in engineer."[41]
>
> Department of Justice—At the present time considerable uncertainty surrounds both of the recently announced DBS joint ventures. The lack of commercial success of previous efforts to utilize DBS technology precludes one from assuming that either or both of the joint ventures will produce a cost-effective technology that will in fact effectively rival the current cable distribution systems. Even if either or both of these systems are successful from a cost/technology perspective, they will not carry local television stations and initially at least will have smaller channel capacities than most cable systems. Moreover, it is not clear at this moment whether the DBS systems will be deployed as a rival or as a complement to current cable systems.[42]

This last point raised by the Department of Justice is important to note. Both joint ventures include cable operators. The K Prime venture will provide programming not carried on cable systems and is seen as a supplement to cable systems and an easier way to increase programming capacity. The Sky Cable venture also plans to have cable operators play a significant role:

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[40] *See also, Broadcasting,* June 18, 1990, which reports: Questions remain . . . about the true viability of home dishes as small as those proposed by Sky Cable and K Prime, about the notorious Ku rain fade and about the purported ease of pointing a consumer dish in crowded city or forested areas.

And of the potential market, said Roy Bliss, executive vice president of United Video, the 20 million [subscriber] number is "crazy. There are only seven million homes left after homes passed by cable, and that is about half saturated. Certainly, the cream has been skimmed." at p. 55.

[41] May 7, 1990, p. 19.

[42] April 2, 1990 comments, pp. 35-36.

> Tom Rogers, President, NBC Cable & Business Development, and another Sky Cable partner, said that cable operators would "have a major incentive to be Sky Cable distributors."
>
> While there are "clearly more ways to access Sky Cable than through cable operators," those with infrastructures are the best to distribute Sky Cable, and "those are the operators," said Rogers. And with increasing uncertainty about regulation, said Rogers, operators aren't rushing to invest money." DBS is a way around that, since it's less expensive for the operator, yet increases channel capacity.[43]

There is certainly potential for direct satellite broadcasts to become significant competitors to cable at some later date. The problem is that there are, as with MMDS, too many unknowns. The Committee cannot rely on it today to protect consumers and others from cable's market power.

TELEPHONE

The 1984 Act codified the FCC rule prohibiting telephone companies from providing cable service in their franchise areas, except in rural areas. Telephone companies thus clearly cannot control video programming content over their own wires and possibly cannot provide video service over their wires even as a common carrier if they, or their users, do not obtain a franchise. Telephone companies, however, can and do provide the wire over which franchised cable operators provide service. Finally, it should be noted that even if the Committee repealed the current prohibition on programming, the Modified Final Judgment (MFJ) in the AT&T antitrust suit still bars the Bell Operating Companies from controlling information content. This means that about 80 percent of the Nation's population would be unaffected unless the MFJ were changed.

The only service that cannot be transmitted over the current telephone network is multichannel video service. The telephone industry, however, has plans to use optic fiber cable and new generations of switches and transmission equipment to create a broadband telephone network which could transport many video signals. The telephone industry is already investing heavily in optic fiber cable for long distance transmission, major local routes, and in some instances for service to large business. That is because optic fiber cable is economic only where large transmission capacity is required. So far, it is not economic to rip out the existing copper wire in homes and replace it with optic fiber cable. However, some believe that time is not that far off.

The consensus view of the Committee is that it would like the telephone industry to construct an optic fiber broadband telephone network provided it is economic. The main issue before the Committee is whether the telephone companies should enter this market as common carriers or whether they should be permitted to play an additional role. There is also the question of local franchising authority over telephone entry into the provision of video services, as well as a host of other issues involved in this debate.[44]

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[43] *Broadcasting*, April 23, 1990, p. 48.

At the Committee executive session to consider reporting this bill, the Committee decided that this matter should be considered separately. The Committee will hold a hearing and an executive session in the coming weeks to decide on an approach to this issue.

THE COMMITTEE APPROACH

It has been the longstanding policy of the Committee to rely, to the maximum feasible extent, upon greater competition to cure market power problems; however, the evidence demonstrates that there is no certainty such competition to cable operators with market power will appear any time soon. The Committee thus has to rely on some greater governmental oversight of the cable industry. Such oversight should be the minimal oversight necessary to rein in this market power. It should also reflect the unique nature of the cable industry and the fact that the extent of this market power varies from locality to locality. While there may be regulatory or structural approaches that might better suit the problems, because these involve changing cable's mode of operation, such approaches are impractical. The Committee is not writing on a blank slate. Finally, this oversight should end as soon as cable is subject to effective competition.

The existing statute permits franchising authorities to regulate the rates for basic cable service on those systems not subject to effective competition. The legislation reported by the Committee continues this approach of regulating the tier of service containing retransmitted local broadcast signals. The Committee also extends this regulation to the equipment used to provide this service. Under the legislation, the FCC shall establish rules to ensure that these rates are reasonable. The rationale for giving the FCC initial jurisdiction over the establishment of rates is that the telecommunications marketplace is global and it is important to establish a national scheme of regulation. In addition, none of cable's current and potential competitors are regulated at the local level. The Committee also recognizes that franchising authorities have a large stake in the operation of cable systems. The legislation thus permits franchising authorities to retain this authority so long as they abide by the FCC's rules.

The Committee believes that regulating just this basic service offering will not adequately address the problem of market power, since people subscribe largely for cable's other program offerings. This fact is supported by the cable industry:

> When a viewer subscribes to cable, he's generally not paying for access to the local broadcast stations, because he can get those free without cable. He's paying for the

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[44] For a more complete discussion of the issues raised by the construction and provision of a broadband network, see *Through the Looking Glass: Integrated Broadband Networks, Regulatory Policy and Institutional Change*, Robert M. Pepper, OPP Working Paper Series (Federal Communications Commission), November, 1988.

> distant signals and nonbroadcast programming that are not available over-the-air (and, possibly, for some enhancement of his reception of local broadcast stations).[45]

Cable operators may simply use this power to charge higher than competitive rates for other service offerings. This view was recently expressed by the FTC:

> If it is determined that some form of explicit rate regulation is necessary to constrain the exercise of market power by cable systems, effective regulation would seemingly require that regulatory authorities be empowered either to control the rates charged for all service tiers, or to impose "minimum quality" controls along with rate controls (e.g., stipulate that "basic" service offer certain specified channels). Absent such regulatory authority, it is unclear that cable rate regulation could effectively constrain the exercise of cable systems' market power should such power be found to exist.[46]

The Committee believes that the alternative suggested by the FTC—to control what should be offered on the basic tier—is not practical and it at least would raise first amendment concerns. It therefore has included in the legislation regulatory oversight of other cable service offerings that are not offered on a per channel or per program basis. The FCC, after receiving a complaint from a franchising authority or a subscriber, is to ensure that rates for these offerings are not significantly excessive.

The Committee has no desire to regulate programming. However, because cable operator bundle transmission, equipment and programming, it is impossible to contain a cable operator's market power without oversight of this bundled rate. The Committee has tried to make this oversight minimal by (1) not extending regulation to programs offered on a per channel or per program (unbundled) basis, and (2) having a standard of oversight that must be triggered by significantly excessive rates.

Where the cable operator has market power derived from its local bottleneck, it can use this power to charge unduly high rates. It can also provide poor quality service for customers and can exact added advantages over programmers and competitors. The following sections will discuss these concerns.

Customer Service

Under the 1984 Act, customer service requirements can be established by the franchising authority.[47] Most franchising authorities have written requirements into their agreements with cable operators. Yet, the Committee has found that many cable operators provide poor service to their customers. Phones are not answered promptly, if at all. Offices are open for a minimal number of hours. Service calls take far too long.

The NCTA has tried to respond to these concerns about customer service. On February 14, 1990, it adopted "Recommended Cable Industry Customer Service Standards". The preamble to these standards states:

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[45] Comments of the National Cable Television Association in MM Docket 89-600, p. 26.

[46] April 20, 1990 Comments to the FCC, p. iv.

[47] Section 632.

> The cable industry is dedicated to providing our customers a consistently high level of service. We are committed to ensuring that our customers receive a variety of quality programming; reliable, clear signals; and prompt, courteous service. To that end, we, as an industry, have voluntarily adopted the following Standards of Customer Service.
>
> Each community and each cable system are different and a reasonable flexibility should be employed in applying these standards; rigidity will hamper rather than help good customer service. We are confident, however, that the industry as a whole will implement these voluntary standards by July 1991, and recommend them for overall operational use by that date.

These rules thus are voluntary, and because of antitrust laws, cannot be enforced by the industry. The expectation of some in the cable industry is that franchising authorities will eventually place these standards in their agreements with cable operators. They will then have an enforceable contractual right. It is unclear whether this will occur, particulary because certain franchising authorities may already believe they have adequate requirements. It should also be noted that not all cable systems belong to the NCTA and thus have not agreed to these standards.

There are also concerns about the value of the NCTA standards. In a March 1, 1990, submission to the Committee, Paul Berra, President, National Association of Telecommunications Officers and Advisors, stated:

> The substance of the NCTA proposed standards is minimal. It is hard to understand why the industry needs 16 months to implement these simple standards. To illustrate my point, I am providing the Committee today a comparison between the standards proposed by NCTA and the standards now contained in the St. Louis city cable ordinance. You will find in every case that St. Louis' city ordinance equals or exceeds the standards proposed. At the same time, I have never heard from my cable operator that our standards are unrealistic, unfair, or unduly burdensome.
>
> Many other State and local governments have set consumer practice standards that have more teeth, are more specific, or are more sensitive to consumer needs that the guidelines recommended by the NCTA. . . .
>
> . . . Congress should not be misled. Simple, voluntary consumer service standards are not a substitute for effective governmental oversight of the cable monopoly's behavior.[48]

The Committee commends the NCTA for making the effort to clean up a problem in the cable industry, and does not wish to provide a disincentive for industries to police themselves. At the same time, the NCTA approach raises concerns, both substantive and procedural. Problems with customer service have been at the heart of complaints about cable television, and strong, mandatory requirements are necessary. The legislation directs the FCC to consider whether the NCTA's recommended standards are sufficient to protect cable customers. If they are not, the FCC shall adopt its own rules. In either event, the standards are to be mandatory, except in those instances where a State law has been in effect as of June 7, 1990.

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[48] Pp. 9-10 of Mr. Berra's statement.

The Committee recognizes that in the six years since the 1984 Act, some States have taken the initiative to protect cable customers by adopting service standards. The Committee believes this initiative should be encouraged, and therefore, the legislation allows those standards to remain in place. However, for States where no standards have been adopted, the Committee believes that they have had more than sufficient time to adopt standards and that we now have to guarantee customers are protected.

Technical Standards

In the same vein as concerns about customer service, the Committee has concerns about the technical quality of cable systems. The 1984 Act provided that the Commission may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise.[49] The FCC implemented this section by retaining its 20-year-old standards for Class I cable channels [50] (retransmitted over-the-air signals) and prohibiting franchising authorities from establishing different standards.[51] As for Class II channels (access channels, channels with satellite delivered programming, and channels used for two way transmission), the FCC has not adopted any signal quality standards and again has prohibited franchising authorities from acting. The U.S. Court of Appeals held that prohibiting franchise authorities from acting on Class II channels in the absence of standards was arbitrary and capricious.[52] The FCC has now proposed merely extending its Class I standards to Class II channels.[53]

The Members of the Committee have received numerous complaints about problems with signals transmitted over cable systems. Cable operators have responded that some of these problems occur during upgrades of systems and that, in any event, the cable industry is rapidly developing its systems and these problems should soon vanish. The Committee recognizes that most cable systems are being upgraded and are installing state-of-the-art technology. At the same time, the Committee believes that cable subscribers should be guaranteed quality signal transmission, and that this will impose a de minimis burden on cable operators. It will also provide certainty for the equipment industry. This need for technical standards is especially great for systems with some degree of market power, where by definition subscribers have less ability to demand quality signals. The legislation thus requires the FCC to establish minimum technical standards for all classes of video programming signals. It also permits the FCC to adopt requirements for other types of signals.

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[49] Section 624(e).

[50] *Cable Television Report and Order, 36 FCC 2d 143, 198, 204 (1972).*

[51] *See,* 102 FCC 2d 1372 (1985).

[52] *See, City of New York v. FCC,* 814 F.2d 720 (D.C. Cir. 1987) aff'd 108 S.Ct. 1637 (1988).

[53] *Further Notice of Proposed Rulemaking, In the Matter of Review of the Technical and Operational Requirements of Part 76, Cable Television,* MM Docket No. 85f-38 (released October 11, 1988).

Home Wiring

This provision addresses the issue of what happens to the cable wiring inside a home when a subscriber terminates cable service. Some cable operators take the position that the wiring inside the home belongs to the operator. Thus, when the subscriber terminates service, these cable operators remove the wiring, often causing damage in the process. These operators do not give the homeowner an opportunity to acquire the wiring. In addition, if a subscriber decides to terminate cable service and later reinstate it or seek service from a different cable company, the subscriber should not have to bear the cost and inconvenience of having new wiring installed.

In the telephone area, the FCC permits consumers to remove, replace, rearrange, or maintain telephone wiring even though it might be owned by a telephone company.[54] The Committee thinks that this is a good policy and should be applied to cable. For cable, however, the Commission should extend its policy to permit ownership of the cable wiring by the homeowners. In doing this, the Committee urges the Commission to adopt policies that will protect consumers against the imposition of unnecessary charges, for example, for home wiring maintenance. The FCC should also require cable operators to describe clearly options concerning home wiring maintenance.

This provision does not apply to any wiring outside the home.

Programming Access, Discrimination, and Cable's Market Power

Just as cable's market power has effects on consumers, a cable operator with market power may also be able to use this power to the detriment of programmers and, through greater control over programmers, to the detriment of video distribution competitors. The Committee was sufficiently concerned about this problem that it adopted four provisions:

Section 6. Nondiscrimination with Respect to Video Programming;

Section 7. Leased Commercial Access;

Section 8. Limitations on (Vertical) Control and Utilization; and

Section 15. Carriage of Local Broadcast Signals.

The following discussion considers these sections.

Nondiscrimination with Respect to Video Programming and Limitations on Vertical Integration

The Committee received much testimony about cable operators exercising their market power derived from their de facto exclusive franchise and lack of local competition. This testimony provided evidence that programmers are sometimes required to give cable operators an exclusive right to carry the programming, a financial interest, or some other added consideration as a condition of carriage on the cable system.

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[54] *See, Detariffing the Installation and Maintenance of Inside Wiring,* (Memorandum, Opinion and Order) FCC 86-513, released November 21, 1986.

> [T]he major cable companies increasingly insist on owning a financial interest in shows and programs they use on their channels, and since in most cities, the cable system is a local monopoly, they have total control of content, on their terms, both as to the producers and in choices presented to the cable audience.[55]
>
> According to the "Wall Sreet Journal" (May 4, 1988 at 29), "Cable system owners have taken minority equity interest in virtually every new programming channel that has started in the past two years." As a practical matter, it is almost impossible in the present environment to start a new cable system service without surrendering equity to the owners of the monopoly cable conduits.[56]

When cable systems are not subject to effective competition, such an outcome is not surprising. Programmers either deal with operators of such systems on their terms or face the threat of not being carried in that market. The Committee believes this disrupts the crucial relationship between the content provider and the consumer.

The Committee understands that there are many other factors that affect the bargaining between the programmer and the cable operator. As was noted earlier, the extent of market power in the cable industry varies in each locality. In addition, there are certain major programmer that are more able to fend for themselves. It is difficult to believe a cable system would not carry the sports channel, ESPN, or the news channel, CNN. In addition, the cable operator has an incentive to put on programming that increases subscribership and decreases churn. These factors counterbalance some of the Committee's concerns regarding the market power of the cable operator vis-a-vis the programmer. However, the Committee continues to believe that the operator in certain instances can abust its locally-derived market power to the detriment of programmers and competitors. The provisions adopted in the legislation reflect that concern. Moreover, these concerns are exacerbated by the increased vertical integration in the cable industry.

Vertical integration occurs when a single firm owns sequential stages of production. A vertically integrated cable company is a company that owns both the programming and the distribution system. For example, Viacom owns programming services such as MTV, Showtime, and Nickelodeon, and also owns Viacom Cable Systems; TCI, the largest multiple system operator (MSO), has financial interests in programming services such as American Movie Classics; the Discovery Channel; the Fashion Channel; and QVC Networks, Inc.

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[55] Testimony of Ben Bagdikian, *Media Ownership: Diversity and Concentration*, Hearings Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation (101-357), June 14, 21, and 22, 1989, p. 88.

[56] Testimony of Prestonm Paden (INTV), *Media Ownership: Diversity and Concentration*, p. 307. *See also*, testimony of Robert Schmidt (Wireless Cable Association), *Oversight of Cable TV*, p. 439.

TOP CABLE NETWORKS WITH MSO OWNERSHIP [57]

Network	Ownership (percent)	Approximate number of carriage subs (in millions)
Turner Broadcasting	([1])	CNN—$50 Headline News—$38 Superstation TBS—$50 TNT—$35
MTV	Viacom	$50
Nickelodeon	Viacom	$49
Nick-at-Nite		$49
Lifetime	Viacom (33.3) ABC (33.3) Hearst (33.3)	$47
Arts and Entertainment	ABC (33.3) Hearst (33.3) NBC (33.3)	$43
The Discovery Channel	TCI, Cox, Newhouse, United Cable (14 each); New York Life (44).	
VH-1	Viacom	$32
Black Entertainment	TCI, ATC, Great American Broadcast (16 each); Robert Johnson (52).	$23
HBO	ATC	$17
Showtime [2]	Viacom	$7

[1] Turner is owned by Ted Turner and a consortium of cable operators including TCI, ATC, United Artists, United Cable, Heritage, Warner, Cablevision, and Continental.

[2] It has been announced that TCI has purchased a 50 percent stake in Showtime. The FTC is now reviewing this proposed purchase.

TOP CABLE NETWORKS WITH NO MSO (MULTIPLE SYSTEM OPERATOR) OWNERSHIP [58]

Network	Ownership (percent)	Approximate number of carriage subs (in millions)
ESPN	ABC (80) RJR Nabisco (20)	$50
USA Network	MCA (50) Paramount (50)	$50
CBN Family Channel	Christian Broadcast Network	$48
The Nashville Network	Gayload Broadcast	$48
The Weather Channel	Landmark Communications	$40
Financial News	Infotechnology	$33
The Disney Channel	Walt Disney Co	$4

Vertical integration in the cable industry raises two concerns. First, the Committee received testimony that vertical integration gives cable operators the incentive and ability to favor their affiliated programming services. The cable operator might give its affiliated programmer a more desirable channel position than another programmer, or even refuse to carry other programmers.

> Because of the trend toward vertical integration, cable operators now have a clear vested interest in the competitive success of some of the programming services seeking access through their conduit. You don't need a Ph.D. in Economics to figure out that the guy who controls a mo-

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[57] *See, Channels,* "1990 Players Chart", December, 1989; and *New York times,* "Fighting for Visibility in a Proliferating Industry", February 4, 1990, Business Section, p. 10.

[58] *Id.*

> nopoly conduit is in a unique position to control the flow of programming traffic to the advantage of the program services in which he has an equity investment and/or in which he is selling advertising availabilities, and to the disadvantage of those services, including local independent broadcasting stations, in which he does not have an equity position.[59]

Second, the Committee received testimony that vertically integrated cable programmers have the incentive and ability to favor cable operators over other video distribution technologies through more favorable prices and terms. These cable programmers also may simply refuse to sell to potential competitors. Small cable operators, satellite dish owners, and wireless cable operators complain that they are denied access to, or charged more for, programming than large, vertically integrated cable operators.

> Restricted access to programming products by a wholesale programmer which is also a retail competitor, reflects the vertically integrated nature of the market and the basic barrier in the development of a competitive market. Without fair and ready access on a consistent, technology-neutral basis, an independent entity like [the National Rural Telecommunications Cooperative] cannot sustain itself in the market.
>
> The programmers pick and choose those outlets to which they will provide distribution rights. But they have not done so based on the quality of an organization's marketing expertise, the financial integrity of the distributor, the size of the potential market, or the lack of cable access (as in rural areas). . . . Programmers which may not be owned in total or directly controlled by cable companies know where the majority of revenues come from and to protect their place in the valuable cable market, they queue-up.[60]

On the other hand, cable witnesses testified that there are benefits to vertical integration.

> Vertical integration can be a good thing or a bad thing, and sometimes can be a good thing and a bad thing at the same time. One of the ways, in fact, the primary way it has been a good thing in the cable industry is that vertical integration has been the means by which we have stimulated the development of programming that was necessary to flesh out the promise of cable, the promise of our medium, when nobody else was really willing to step up and put up the money.[61]

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[59] Testimony of Preston Padden (INTV), *Media Ownership: Diversity and Concentration*, p. 308 (emphasis in the original). *See also*, Mr. Padden's testimony at p. 310; the testimony of Robert Schmidt (Wireless Cable Association), pp. 288-289; the testimony of James Hedlund (INTV) at the hearing on The Cable TV Consumer Protection Act, p. 196.

[60] Testimony of Bob Phillips (NRTC), *Media Ownership: Diversity and Concentration, p. 359. See also*, the testimony of Bob Phillips, pp. 347, 355; and the testimony of Gene Kimmelman (CFA), pp. 376, 386.

[61] Testimony of James Mooney (NCTA), *Oversight of Cable TV*, pp. 178-79.

But even some members of the cable industry have expressed concern about vertical integration. John Malone, President and Chief Executive Officer of TCI, for instance, testified that "[w]e, and many others, are concerned about the vertical integration going on, for fear of how it affects us." [62]

One way to address the concerns raised by vertical integration is to prohibit it altogether. The 1974 "Cable Report to the President", for instance, recommended a ban on common ownership of content and conduit.

> We recommend adoption of a policy that would separate the ownership and control of cable distribution facilities, or the means of communications, from the ownership and control of the programming or other information services carried on the cable channels. [63]

While this approach has appeal, it would result in a fundamental restructuring of a cable industry and the way it does business. Instead, the Committee has decided to focus on ensuring competitive dealings between programmers and cable operators and between programmers and competing video distributors. The legislation directs the FCC to promulgate regulations limiting the number of channels that can be occupied on a cable system by programmers affiliated with the cable operator. In determining what limitations are reasonable, the FCC should consider the channel capacity of the system as well as consumer interest and the goal of increasing diversity.

To ensure that cable operators do not favor their affiliated programmers over others, the legislation bars cable operators from discriminating against unaffiliated programmers. Cable operators shall not discriminate in the terms of carriage. Moreover, the Committee looks unfavorably upon agreements between cable operators and cable programmers that limit the discretion of a cable operator to carry other programmers. As a check on the market power of cable operators, the bill also bars operators from requiring a financial interest in a programming service as a condition of carriage.

To address the complaints of small cable operators that cable programmers will not deal with them or unreasonably discriminate against them in the sale of programming, the legislation requires vertically integrated, national cable programmers to make programming available to all cable operators and their buying agents on similar price, terms, and conditions. A requirement of dealing on similar terms is moderate, as even members of the cable industry have acknowledged. John Malone of TCI testified that:

> [A] number of small cable operators in the Midwest have banded together in a cooperative to try to gain some of the same economies of scale in their joint purchase of cable programming. The cooperative has enjoyed success with some programmers, but not with others. I fully support their efforts, and I see no reason why all programmers

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[62] *Media Ownership: Diversity and Concentration*, p. 14.

[63] This report is quoted in the testimony of Preston Padden (INTV), *Media Ownership: Diversity and Concentration*, p. 311.

> should not accord the cooperative and others like it the benefits of whatever scale economies they can offer.[64]

To encourage competition to cable, the bill bars vertically integrated, national cable programmers from unreasonably refusing to deal with any multichannel video distributor or from discriminating in the price, terms, and conditions in the sale of programming if such action would have the effect of impeding retail competition. This provision is limited to vertically integrated companies because the incentive to favor cable over other technologies is most evident with them. It is limited to national cable programmers, that is, programmers who license for distribution to more than 15 States, to allow nascent programmers to gain a foothold through exclusive arrangements.

To ensure that cable programming is made available to owners of home satellite dishes, the bill requires any cable programmer who scrambles its (C-Band) signal to make its programming available for private viewing by receive-only home satellite antenna users.

The Committee deleted a finding from the bill which stated that exclusivity is a legitimate business strategy. The Commission shall, based on the particular circumstances and conduct, determine whether the actions of the programmer, including an agreement for exclusivity, constitutes an unreasonable refusal to deal.

The bill provides for an expedited administrative remedy for complaints brought under new section 640 of the Act. The goal of this provision is to have programming disputes resolved quickly and without imposing undue costs on the involved parties. Without such a remedy, start-up companies, in effect, might be denied relief in light of the prohibitive cost of pursuing an antitrust suit. The FCC is directed to impose penalties for frivolous complaints.

The legislation provides new FCC remedies and does not amend existing antitrust laws. All antitrust and other remedies which can be pursued under current law by multichannel video programming distributors are therefore unaffected by this section. Such existing remedies would still be available to challenge practices of both affiliated and independent programmers.

Cable Channels For Commerical Use

The 1984 Act contains a provision requiring cable systems with more than 36 channels to set aside a certain percentage of those channels for lease to programmers.[65] The objective of this provision is to "assure that the widest possible diversity of information sources are made available to the public".[66] The House Report on the 1984 Act states:

> An important concept in assuring that cable systems provide the public with a true diversity of programming sources is leased access. Leased access is aimed at assuring that cable channels are available to enable program suppliers to furnish programming when the cable operator

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[64] *Oversight of Cable TV*, p. 129.

[65] Section 612.

[66] Subsection 612(a).

> may elect not to provide that service as part of the program offerings he makes available to subscribers. Thus, section 612 establishes a scheme to assure access to cable systems to third parties unaffiliated with the cable operator, and thereby promotes and encourages an increase in the sources of programming available to the public.[67]

The House Report also contains an elaborate discussion of the First Amendment rationale for this provision.[68]

The legislation reported by the Committee is largely designed to remedy market power in the cable industry. In this context, the leased access provision takes on added importance—in addition to First Amendment concerns. It can act as a safety valve for programmers who may be subject to a cable operator's market power and who may be denied access or be given access on unfavorable terms. The legislation thus contains additional language for the subsection regarding the purposes of the leased access provision: "to promote competition in the delivery of diverse sources of video programming".

In its examination of market power in the cable industry, the Committee examined this leased access statute and inquired as to its effectiveness. The record before the Committee demonstrates that this provision has hardly been used:

> [F]ew programmers or businesses have made use of the commercial leased access channels mandated by the Cable Act. (Response of Messrs. Mooney and Robbins to questions of Senator Inouye.)[69]
>
> Unfortunately, this section of the Act has proven to be absolutely useless in seeking to advance the objectives of assuring consumers access to the widest possible variety of video sources and services. (Statement of Preston Padden.)[70]

The record also shows why this provision has not been used. The cable industry argues that is because:

> (1) The industry has been successful "in meeting the diverse range of viewing needs" [71]; and
>
> (2) Most cable programmers are paid by the cable system for carriage, but, with leased access, it is the programmer who must pay the cable operator. As stated by cable officials, "Such economics would be very uncertain and do not guarantee that (a) an independnet producer can generate enough local adverstising revenue to cover the costs of paying for a network without separate suscriber fees; (b) have enough money left over to pay the operator for carriage on the leased access channel; and (c) still earn a profit." [72]

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[67] Report No. 98-934, p. 47.

[68] *Id.*, Pp. 31-36.

[69] *Oversight of Cable TV*, p. 103.

[70] *Oversight of Cable TV*, p. 395.

[71] Answers to Questions Submitted to John Malone, *Oversight of Cable TV*, p. 146.

[72] Responses of Messrs. Mooney and Robbins to Qeustions of Senator Inouye, *Oversight of Cable TV*, pp. 102-103.

While these reasons may have some foundation, the record provides other rationale. This testimony given by Preston Padden provides an example:

> With the benefit of hindsight, it is apparent that the likely failure of the leased access provision was evident in the text of the Act itself. Section 612(d) explicitly provides that in any action brought challenging the price, terms or conditions for leased access "the court shall not consider the price, term or condition established between an operator and an affiliate for comparable services." This most unfortunate provision is equivalent to providing that when evaluating the reasonableness of Local Exchange Carrier's interconnection with other carriers, the price, terms and conditions of the LECs relationship with its own affiliates should not be considered. *Reductio ad absurdam*! This provision totally gutted the efficacy of the leased acess section, killing any hope of its acting as a curb against anticompetitive activities by vertically integrated operators . . .
>
> For irrefutable evidence of the failure of the leased access provision, on need look no further than the marketplace. Despite widespread instances of dropping of local broadcast stations and refusals to carry competitive program services, there is no evidence that excluded programmers have been successful in gaining access though Section 612.[73]

The leased access provision (subsection (c)) delegates to the cable operator the task of initially establishing rates, terms, and conditions. If the programmer does not find these reasonable, the programmer may then seek relief at the FCC and in the courts. It does not take much understanding of the incentives of the parties and the nature of the programming market to understand that such an approach has fundamental problems.

The cable operator is almost certain to have interests that clash with that of the programmer seeking to use leased access channels. If their interests were similar, the operator would have been more than willing to carry the programmer on regular cable channels. The operator thus has already decided for any number of reasons not to carry the programmer. For example, the operator may believe that the programmer might compete with programming that the operator owns or controls. To then permit the operator to establish the leased access rate makes little sense. In addition, in a market as dynamic as the programming market, giving recourse to the FCC is of little solace. Finally, for a programmer to be successful, the programmer may well have to be carried on many cable systems and thus have to negotiate leased access rates with many operators. Because of the uncertainty caused by this provision, a programmer would almost certainly see this as a hopeless task.

The cable industry has a sound argument in claiming that the economics of leased access are not conducive to its use. However, the existing provision does not improve the situation. For a programmer to have any chance of success, the programmer must negotiate many elements—a reasonable rate for access and then for billing and collection, and then reach an agreement on key terms and conditions (for example, tier and channel location)—and, as stated above, repeat this negotiation for each system.

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[73] *Oversight of Cable TV*, pp. 396–397.

The Committee believes that the leased access provision is an important safety valve for anticompetitive practices. The Committee also believes the existing provision does not work well and requires revisions. The legislation carries out this intent by requiring that the FCC establish maximum reasonable rates for access to these channels, as well as for billing and collection. The operator and programmer can bargain for a lower rate. The Commission also shall establish reasonable terms and conditions for carriage. By involving the FCC before leases are negotiated, programmers will know the parameters of an agreement, increasing certainty and the use of these channels.

The Carriage of Local Broadcast Signals

BACKGROUND: THE ORIGINATION OF THE RULES

In the early 1960's, the FCC viewed the development of cable television as potentially harmful to local broadcast television service and the ability of these stations to serve the public interest. In 1963, the Commission first acted on this concern in *Carter Mountain Transmission Corp.*[74], requiring carriage of a local television station as a precondition to granting a microwave license to a rural cable system.[75] Three years later, this case was expanded to all microwave-fed cable systems, and a year later, to all cable systems regardless of how signals were imported.[76] In 1972, the Commission refined its must-carry rules so that they were compatible with the newly adopted comprehensive rules for regulation of the cable industry.[77]

All of these actions were based on the premise that the Act sought "to make television service available, so far as possible, to all people of the United States on a fair, efficient, and equitable basis" [78] and that "it was of the utmost importance to the public interest that extensions of television service by the auxiliary facilities of cable be accomplished in a fair and equitable manner and that cable and broadcast facilities have complementary, rather than conflicting, roles." [79] More specifically, the Commission reasoned that where a cable system did not carry a local station, each subscriber gained by the cable system was a viewer lost by the television station. The television station would then face decreased revenues and profits, which would reduce its ability to serve the public interest. The Commission stated that because the consequences could be so severe it was adopting the must carry rules even though it had not been demonstrated that these losses would occur.

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[74] *Carter Mountain Transmission Corp.* v. *FCC*, 321 F.2d 359 (1963).

[75] *First Report and Order*, 38 FCC 716–719 (1963).

[76] *Second Report and Order*, 2 FCC2d 725 (1966).

[77] *1972 Rule*, FCC2d 214.

[78] 38 FCC at 699.

[79] *Id.*, p. 703.

BACKGROUND: THE QUINCY DECISION

On July 19, 1985, the U.S. Court of Appeals (D.C. Circuit) found, in the *Quincy*[80] case, the must-carry rules unconstitutional. The court concluded that the rules infringed upon the cable operator's right freely to exercise editorial discretion in selecting the content of program services. The court reasoned, for example, that the must-carry requirements may occupy so much space on a cable system that other programming would not be carried. It also held that the Commission had produced no evidence demonstrating that television stations would actually be harmed by not being carried by cable systems. In sum, the court found the rules overinclusive and indiscriminate in protecting every broadcaster. It concluded, however, that some other version of these rules might be found constitutional.

BACKGROUND: THE REVISED RULES

The FCC refused to appeal the *Quincy* decision and was prepared to acquiesce in the court's ruling. The Congress and the broadcast community, however, believed the Commission should fashion a new set of rules that could withstand constitutional muster, and together, they forced the FCC to initiate a proceeding in November 1985. Five months later, the cable and broadcast industries reached agreement on new rules. The Commission, however, did not adopt new rules until November 1986.[81]

The Commission's reticence in adopting must-carry rules was further demonstrated in its new rules. Rather than simply adopting the industry compromise or making minor adjustments to it, the Commission embarked on a much different course. The FCC found that the best solution to the carriage problem would be to require cable operators to install input selector or "A/B" switches. These switches would permit viewers to switch between the cable system and the over-the-air broadcast transmission. The Commission, however, concluded that it would take some time to educate viewers about the switch option and to install switches. It, therefore, adopted a modified set of must-carry rules with a five-year sunset date.

The Commission supported these new rules with the following reasoning:

> [W]e recognize must carry rules are a stringent form of regulation that intrude on cable operators' free speech rights. Although we have found that consumers would have difficulty receiving off-the-air signals at present, the part of our regulatory plan pertaining to input selector switches and consumer education is expected to resolve this problem. Accordingly, we find no need or justification in this proceeding for imposing must carry requirements for more than a five year period. We conclude that must carry regulations are neither desirable nor sustainable as

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[80] *Quincy Cable TV v. FCC*, 768 F.2d 1434 (1985).

[81] *Report and Order*, MM Docket 85-349 (November 28, 1986). On December 24, 1986, the Commission stayed the effective date of these new rules pending completion of a reconsideration proceeding.

> long-term solutions to the problem of cable subscribers' access to broadcast signals and, in fact, would impede our objective of maximizing program choices to viewers.[82]

While the Commission's action was supported by Commissioner Quello, he issued a separate statement finding fault with the Commission's reasoning and proposal:

> I continue to believe that only comprehensive must-carry rules can guarantee full protection to our system of over-the-air television broadcasting and the government's legitimate interest, pursuant to Sections 1 and 307(b) of the Communications Act, in fostering a system accountable to the public interest. Cable, once installed, is a georgraphic bottleneck with, unlike broadcasting, little or no program accountability to any public or government authority . . . The most obvious shortcoming of our Order is that in justifying a must-carry rule, it does not rely on the substantial government interest in protecting the integrity of our Table of Assignments and ensuring public access to stations that have a statutory obligation to serve their local communities. In my view, both interests are substantial enough to justify a must-carry rule, without resort to any notion that broadcasters face economic ruin in the absence of a must-carry rule.[83]

The Commission received thirty petitions to reconsider this decision, with most of the parties concerned about the input selector switch requirement and the reasoning behind it. On May 1, 1987, the Commission issued a new decision.[84] It continued to rely on its previous reasoning, however, and most of the revisions were minor.

BACKGROUND: THE CENTURY DECISION

This Commission decision was promptly appeared in court. The U.S. Court of Appeals (D.C. Circuit) issued its opinion in December 1987 (the Century[85] decision). It found the Commission's new must-carry requirements an unconstitutional infringement upon the First Amendment rights of cable operators. The court stated:

> [W]e simply cannot accept, without evidence to the contrary, the sluggish profile of the American consumer that the Commission's argument necessarily presupposes . . . it begs incredulity to simply assume that consumers are so unresponsible that within the span of five years they would not manage to purchase an inexpensive hardware-store switch upon learning that it could provide access to a considerable storehouse of new television stations and shows.
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> Even were we to accept, however, the Commission's view that consumer ignorance cannot be readily eradicated, we have a second fundamental problem with the Commis-

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[82] *Id.*, p. 23.

[83] *Id.*, p. 49.

[84] *Memorandum Opinion and Order*, MM Docket 85-349 (May 1, 1987).

[85] *Century Communications Corp. v. FCC*, 835 F. 2d 292 (D.C. Cir. 1987).

> sion's judgment that its interim must-carry rules are needed to advance a substantial governmental interest sufficient to support burdening cable operators' first amendment rights. The Commission relies heavily on its assumption that in the absence of must-carry rules, cable companies would drop local broadcasts. Experience belies that assertion.[86]

While the court found the must-carry requirements unconstitutional, it should be noted that it did not reach any decision concerning input selector switches and consumer education. These requirements, with some modifications by the Commission, remain in effect. Finally, the court made it clear that must-carry requirements are not per se unconstitutional. It simply held "that, in the absence of record evidence in support of its policy" the FCC's newly adopted rules had not been demonstrated to further a substantial government interest or to be narrowly tailored to limit any infringement upon speech.

THE COMMITTEE APPROACH

The Committee strongly supports reinstitution of the must-carry requirements. These requirements further the Committee's longtime view, reflected in title III of the Act, that television broadcasting plays a vital role in serving the public interest. The Committe finds that this role is in jeopardy if cable operators can use their market power either to refuse to carry local television broadcast signals or to extract favorable terms as consideration for carriage of these signals. The Committee also finds that the must-carry rules are part and parcel of the Congressionally-mandated compulsory copyright license[87] for cable operators and that provides an additional reason for codification of these rules.

The Committee has been closely involved with the creation of America's system of broadcasting. It is a unique scheme that emphasizes responsiveness to the local community and places the broadcaster in the role of public trustee for the frequencies it is permitted to use. There is no doubt that, over the past 40 years, television broadcasting has provided vital local service through its programming, including its news and public affairs offerings and its emergency broadcasts. The Committee believes this service should continue; however, it will be jeopardized if cable operators use their market power either to preclude carriage of television broadcast signals or to carry such signals but without proper consideration to the programmer. This view was expressed to the Committee by Edward Fritts, President of the National Association of Broadcasters:

> This system [of local television broadcasting] cannot function properly, of course, unless local television stations have access to the viewers they are licensed and required by the FCC to serve. An "open gate" between local stations and their viewers must be preserved, for stations simply cannot respond to viewers that they cannot reach.

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[86] *Id.*, p. 302.

[87] 17 U.S.C. 111.

> Access to local audiences can be both enhanced by, and frustrated by, cable. As it originally developed, the cable industry was a means to facilitate reception of local over-the-air television stations. Indeed, cable first was called "community antenna television." Today, cable provides many additional kinds of programs, but retransmission of local television signals remains one of cable's most important attractions to subscribers.
>
> Once a home is connected to cable, however, that home becomes extremely dependent upon that cable for reception of local television stations. Even though these signals theoretically are available over-the-air, when a local television station is not carried on a cable system, cable subscribers effectively lose their ability to watch it. The cable becomes a gate, over which the local system has contorl.[88]

There is substantial objective evidence that cable operators have denied and will continue to deny local broadcasters carriage on their systems. The most prominent study of the cable industry's behavior was performed by the FCC in 1988.[89] Its results demonstrate that, absent legislative action, the free local off-air broadcast system is endangered, thereby threatening diversity of choice not only for cable subscribers, but also for those who do not subscribe to cable.

The report found, among other things, that:

> 1. Of the 4,303 cable systems that voluntarily disclosed data to the FCC, 869 systems admitted denying carriage to 704 television stations in 1,820 instances.[90] Moreover, 279 of the stations dropped, involving 753 instances of non-carriage, were eligible for must-carry status even under the limited "compromise", post-*Quincy* must-carry rules agreed upon by both the cable and broadcast industries.[91] These figures are extrapolated and therefore approximate.
>
> 2. Two hundred and forty-one of the reporting cable systems have denied carriage to three or more local stations, and 113 systems have denied carriage to four or more stations.[92]
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> 3. The vast majority of local independent stations dropped by responding cable systems—at least 378 of 485 (78 percent)—were located within 50 miles of the cable headend.[93]

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[88] *Must Carry*, Hearing Before the Subcommittee on Communications of the Senate Committee on Commerce, Science and Transportation (101-427), October 25, 1989, p. 38; *See also*, the testimony of Preston Padden, for a discussion of the *Century* decision and the Court of Appeals' rationale. The court stated that it saw no evidence of harm to television broadcasters because it found that few stations had been dropped from cable systems. However, as demonstrated in this testimony and elsewhere in the record, a cable operator can use market power to obtain various types of increased consideration from broadcasters. Thus, it is not correct to base harm merely on whether stations are dropped.

[89] *Cable System Broadcast Signal Carriage Survey*, Staff Report by the Policy & Rules Division, Mass Media Bureau, Sept. 1, 1988.

[90] *Id.*, Table 2.

[91] *Id.*, Table 2A.

[92] *Id.*, Table 4.

[93] *Id.*, Table 7.

4. By far the most frequent replacement for a dropped local television station is a basic cable network—the program services in which cable operators often own equity interests and/or profit from local advertising sales.[94]

5. In 236 instances, reporting television stations made cash payments or supplied other consideration (usually equipment) in return for continued carriage on cable. At least 120 of these payments exceeded $45,000 per year.[95] One hundred twenty instances of cash payments and an additional 30 instances of a "combination" of considerations were reported.[96]

Among the systems that came forward, more than 20 percent (869 of 4,303 systems) had dropped one or more local stations from their channel lineups in 1,820 instances. The Committee notes that if one makes the extremely conservative and optimistic assumption that the incidence of non-carriage of local stations on the part of cable systems that did not disclose information to the FCC is roughly the same and that none of the reporting cable systems understated their non-carriage of local stations, it would mean that approximately 1,700 cable systems have denied carriage of local television stations in approximately 3,600 instances. Thus, any way that one looks at these numbers, the report reveals clearly that non-carriage of local stations by cable systems is a serious problem numbering in the thousands in terms of both cable systems and instances of non-carriage.

The Committee also takes note of additional evidence regarding the lack of carriage by cable operators.[97] Indeed, even studies submitted by the cable industry demonstrate that lack of carriage has become commonplace. A study prepared by NCTA found that 205 cable systems were not carrying, and 2,500,000 subscribers were denied access to, all local broadcast stations.

Second, cable operators who carry local broadcast stations have shifted the placement of these stations on their systems. This has the effect of stifling competition. Moreover, it has interfered with the ability of broadcasters to fulfill their statutory obligations to serve their communities.

More specifically, channel repositioning by the cable operator creates two fundamental problems. First, after building an audience on a particular cable channel, repositioning makes it difficult for audiences to locate stations. Second, cable operators have built distribution plants in which not all of the channels are equal. The first 12 channels (2–13) get through to all cable-connected sets. However, the higher channel numbers (14 and above) are viewable on cable-connected sets that are not "cable ready". Based on data from the "1989 Television Fact Book," approximately 42 percent of television sets in homes today are not "cable ready".

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[94] *Id.*, Table 8.

[95] *Id.*, Table 14.

[96] *Id.*

[97] *See* Testimony of James Hedlund, The Cable Consumer Protection Act of 1989, pp. 197–201 (citing several studies demonstrating lack of carriage and channel positioning previously submitted to this Committee including "Free Television Under Siege", May, 1988); and testimony of Edward Fritts, (citing several studies conducted by the NAB).

In the FCC's survey, 974 of the cable systems responding admitted that they had shifted one or more local stations in almost 3,000 instances.[98] According to the FCC, 85 percent of the repositionings were done for "marketing reasons". Only 15 percent of these shifts were for "technical" reasons.[99] In almost every instance, the stations shifted have been replaced by cable program services in which the system operator is selling advertising or in which the operator has an equity interest, or both.

In addition to the FCC study, the record before the Committee is replete with evidence of channel repositioning by cable operators. Based on the record, the Committee is persuaded that channel repositioning has a direct and negative impact on the competitive viability of local broadcast stations and thus the ability to serve the needs of local communities. There is ample evidence in the record demonstrating that channel repositioning is accompanied by a significant audience loss.[100] Moreover, repositioning can prevent significant portions of the community from receiving local off-air broadcast signals.

The Committee notes that repositioning of local broadcast signals does not appear to be the result of subscriber preference or marketplace demand. In most instances, the local stations shifted are more popular, as measured by audience rating, than the cable program services that replace them. Shifts are made solely to enhance the competitive position of the cable operator's programming or its advertising availabilities.

The Committee believes that the incentive to engage in such anti-competitive activity will continue. Cable operators will continue to compete with local broadcasters for local advertising revenues. Cable's local advertising revenues are expected to grow at a compound rate of 17.1 percent, from $250 million in 1988 to $550 million in 1993.[101] Moreover, cable operators have acquired and will continue to acquire ownership interests in programming services that are exhibited on cable systems. As a result, there will be a continued incentive to deny carriage and reposition local broadcast stations.

The Committee heard testimony that cable could not use its market power to the detriment of television broadcasters since cable subscribers could still easily receive signals sent over-the-air. The Committee, however, believes the facts belie this view. The Committee received considerable evidence that once individuals subscribe to cable it is rare for them ever to switch to receive an over-the-air signal.[102] Both the cable and the broadcast industries have stated that the A/B switch is not a workable solution to the carriage problem.[103] As the FCC noted, the cable industry encouraged its subscribers to take down their antennas and eliminate their capability to receive signal off-air. Evidence before the Committee demonstrates that fewer than 1 percent of cable subscribers have an outdoor antenna and an A/B switch. Among other problems, 98 percent of cable homes do not have roof top antennas connected to their television sets,[104] and those antennas that remain are often in poor condition. In many areas of the country, terrain problems and buildings preclude adequate reception. Zoning ordinances and restrictive covenants often prevent the installation of antennas. Cable-ready television sets, remote controls, and video cassette recorders make switching back and forth between cable and off-air reception cumbersome or impossible.

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[98] *FCC Report* at Table 10.

[99] *Id.*, at Table 13.

[100] *See*, Testimony of James Hedlund, *The Cable Television Consumer Protection Act of 1989*, p. 207; testimony of Preston Padden, *Must Carry*, pp. 73–76; and testimony of Edward Fritts, p. 35.

[101] *See*, Statement of James Hedlund, *The Cable Television Consumer Protection Act of 1989*, pp. 213–14.

[102] *See, e.g., Must Carry*, pp. 39, 80.

[103] *See*, Joint Petition for Reconsideration by NAB, NCTA & CATA filed before the FCC in MM Docket No. 85-349, December 17, 1986; Joint Request for Stay Pending Reconsideration filed by NAB, NCTA and CATA before the FCC in MM Docket No. 85-349, December 17, 1986.

The technical and economic complexities involved with an A/B switch make it an unworkable solution. In this regard, despite the FCC's initial optimistic appraisal of its consumer education and A/B input selector switch rules, the Committee now finds that the FCC's approach, in practice, has been ineffective in providing cable subscribers with access to local broadcast signals. Must-carry and channel positioning rules are the only means through which local broadcasters can secure access to cable subscribers. This means that television broadcasters, like other programmers, can be at the mercy of a cable operator's market power.

How a cable operator's market power will be exercised will depend on the type of broadcasting station, with network affiliates, for example, having more bargaining power than independent stations. These and other factors dictate not only whether a local television station will be carried, but also the terms of carriage. Will the station have to pay for carriage? Will the station be located on a channel different from the one assigned by the FCC for over-the-air service or on a channel location that subscribers rarely view or cannot view without added equipment? In the dynamic video market, these are concerns with enormous consequences. Even for the strongest television stations, it is clear that cable operators with market power can extract some consideration that could not be gained in an effectively competitive marketplace. While such a situation is of concern to the Committee (as demonstrated in the previous sections discussing use of market power to the detriment of programmers), such concern is greatly elevated because of the importance of the American system of broadcasting and what it means to the delivery of information of import to communities. It is for this reason that the legislation incorporates a special provision focusing just on the carriage of local broadcast signals. Moreover, this provision addresses both the primary concern of carriage and the secondary concerns of the terms of carriage. Finally, the Committee believes that this provision, by not including a minimum viewing standard, will help new stations and stations that target special audiences to obtain carriage, thus increasing the diversity of local programming available to viewers.

There is an additional reason for this provision, separate and apart from concerns about market power and our scheme of broadcasting:

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[104] ELRA Group, Inc. "Outdoor Antennas, Reception of Local Television Signals and Cable Television," January 28, 1986.

> Congress has conferred upon the cable industry the extraordinary benefit of a compulsory copyright license. This license enables cable operators to take, then to sell to consumers, all of the programming produced or purchased by local broadcast stations. The cable operator pays nothing for all of this programming which constitutes the most valuable portion of the service that it sells to consumers.
>
> Having conferred this extraordinary privilege upon the cable industry, it seems incumbent upon the Congress to require that cable operators not unfairly abuse local stations.[105]

The compulsory copyright license that Congress gave to cable operators in 1976 gives them the ability "to retransmit some or all of the programs of local stations, without their consent and virtually without payment." [106] This means that without must-carry rules, cable operators can "cherry pick" a broadcaster's programs. It also means that a cable operator has an advantage over the broadcaster in any negotiation over carriage rights. This again undermines the Congressionally-created American system of broadcasting. The Committee believes that the public interest is not served by having the compulsory copyright license for the cable industry without also having requirements for the carriage of local broadcast signals. The legislation thus permits continuation of the compulsory copyright license but ensures that it will operate in the public interest by reinstituting the must-carry rules.

Horizontal Integration (National and Regional)

In addition to testimony regarding the cable industry's market power at the local level, the Committee has also received comment that horizontal integration at the regional and national level could present concerns about market power. These concerns are somewhat analogous to those raised by interested parties and remedied by the FCC in its rule limiting nationwide ownership of broadcast media (the "12-12-12" rule).[107] However, it is important to note that there is an added factor at work here: the local market power of each cable operator.

Concentration has grown dramatically in the cable industry in the last few years. As late as 1981, no cable operator owning multiple systems had more than two million subscribers. In 1985, about 29 percent of all subscribing households were served by the five largest multiple system operators. As of the end of 1989, TCI, the Nation's largest cable company, owned, controlled, or had investments in systems serving almost 12 million subscribers (about 24 percent of cable's total subscribers). Time-Warner's cable subsidiary reaches about 6,100,000 subscribers (about 12 percent). The next three largest cable systems—Continental, Comcast, and Cox—reach about 5,600,000 subscribers (about 11 percent).[108] The top five firms thus control almost 50 percent of the Nation's subscribers.

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[105] Testimony of Preston Padden, *Must Carry*, p. 77.

[106] Testimony of Edward Fritts, *Must Carry*, p. 42.

[107] FCC Rule 73.3555(d).

[108] The data used here comes from Paul Kagan Associates.

This increase in concentration raise two major concerns. First, there are special concerns about concentration of the media in the hands of a few who may control the dissemination of information. The concern is that the media gatekeepers may (1) slant information according to their own biases, or (2) provide no outlet for unorthodox or unpopular speech because it does not sell well, or both. This view was expressed forcefully at the Committee's March 29th hearing by James Hedlund, President of the Independent Television Association:

> Should this development [about increased concentration] concern the Congress? Yes! Its traditional concerns with media concentration—promoting diversity of voices and economic competition—are dramatically present in the cable industry.
>
> Separate and antagonistic ownership of the mass media has long been a goal of federal policy makers. The policy has its foundation the First Amendment goal of promoting a diversity of ideas and speech throughout the country. Federal policy has always been vigilant to restrain concentration when it threatened a diversity of voices even though it did not rise to the level of an anti-trust violation.[109], [110]

The second concern about horizontal concentration is that it can be the basis of anticompetitive acts. For example, a market that is dominated by one buyer of a product, a monopsonist, does not give the seller any of the benefits of competition. For example, if one MSO owned all the cable systems in the United States, it would have tremendous power vis-à-vis producers of programming. Even with fewer ownership interests, the MSO could still have significant market power.

Witnesses at the hearings testified that, with the increased concentration in the cable industry, the large MSOs have the market power to determine what programming services can "make it" on cable. They also argued that the large MSOs force programmers to buy their way onto cable by giving up an equity interest in their programming.

> Cable operators who control access to a large part of the viewing public. . .can extract concessions from programmers who desperately need to reach a large audience. Because they have market power over consumers, the MSOs pocket these consessions as excess profits, rather than passing them through to consumers. They exercise their monopsony power vis-à-vis consumers.[111] (Testimony of Gene Kimmelman, Consumer Federation of America.)

While the Committee has concerns about horizontal concentration, the Committee also recognizes there are legitimate reasons for integration. These were expressed by John Malone in his November 16, 1989 testimony:

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[109] *Cable TV Consumer Protection Act*, p. 192.

[110] *See also*, the testimony of Ben Bagdikian at the hearings on *Media Ownership: Diversity and Concentration*, p. 88.

[111] *Media Ownership: Diversity and Concentration*, p. 357; *See also*, Testimony of James Hedlund, *Cable TV Consumer Protection Act*, p. 9.

> The media business is driven by the fact that it costs a great deal of money to create the first copy of any media product, be it software, information or entertainment. Once you have created that product, however, the marginal costs of replicating and distributing it is very, very low. It is this simple fact that drives media companies toward becoming very large—the ability to spread their "first copy costs" over a larger and larger number of consumers.
>
> The efficiencies associated with the increased size of cable companies have produced cost savings and contributed to rate stability enjoyed by cable consumers in recent years. . .[112]

Mr. Malone, however, told the Committee that he believes some limits are appropriate to protect the public interest:

> Senator GORE. Would you believe that there is some justification for the Congress putting a limit on the number of cable systems that a company like yours can own?
>
> Mr. MALONE. Yes, sir.
>
> Senator GORE. You do?
>
> Mr. MALONE. Yes.
>
> Senator GORE. Where do you think that limit ought to be?
>
> Mr. MALONE. I'm not sure. You know, it depends on how you count, I think, to some degree. But, you know, broadcasters right now I think can own 25 percent of the market with VHF stations and up to 50 with UHF stations. Our technology is different. Clearly, some lower limits are in order for our industry.[113]

Although the FCC has the authority to impose horizontal limitations on the cable industry (both national and regional), it has not done so. In 1968, the FCC proposed, but never took final action on, rules to limit the size of MSOs. It proposed a 50-system limitation, making the assumption that each system would have at least 1,000 subscribers. If other media interests were held (one TV station, two radio stations, or two newspapers), then the ownership limit would be 25 systems. The effect of the rules would have been a cap of about two million subscribers.[114] In the mid-1980's, Satcom (a small cable operator from Montana), filed a petition with the Commission to establish rules. Again, the Commission failed to act. Thus, unlike the broadcast industry, no limitations apply to the concentration of ownership in the cable industry.

To address the issue of national concentration in the cable industry and enhance effective competition, the legislation directs the FCC to place reasonable limits on the size of MSOs (by the number of subscribers). The Commission should balance the concerns expressed about concentration with the efficiencies gained by greater integration. The legislation does not imply that any existing company must be divested and gives the FCC flexibility to determine what limits are reasonable and in the public interest.

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[112] *Oversight of Cable TV*, p. 129.

[113] *Oversight of Cable TV*, pp. 160–161.

[114] 33 FR 19028 (1968).

Cross-ownership

Cross-ownership of different means of video distribution raises First Amendment concerns as well as economic considerations. First amendment concerns are raised because common ownership of different media limits the number of different voices available to the public. Additionally, ownership interests that provide incentives and opportunities to engage in anticompetitive acts raise the prices that consumers must pay and limit the types of services that are offered. On the other hand, a policy that only focuses on diversity and restricts the ownership of other outlets may ignore important economies of scale or scope, also raising prices and limiting offerings. Thus, the overall objective in reviewing media ownership is to strive for diversity while balancing genuine and significant efficiencies.

The government's involvement in ensuring media diversity goes back to at least the beginnings of the Act. Soon after being created, the FCC began an investigation of ownership of radio networks that resulted in the "Chain Broadcast Rules", which in effect prevented one radio network from owning another radio network.[115] In 1943, the Commission also adopted a rule prohibiting a person from owning more than one broadcast station in a local market (the so-called "duopoly" policy).[116]

Since then, the Commission has adopted extensive rules governing media ownership. They can be generally grouped into two classes: rules concerning ownership in the local market, and the concentration of control rules concerning regional and nationwide markets. The Commission reiterated its "one station of the same service per person" rule in 1964, and in 1970 extended this policy to ownership of stations of different services (with certain exceptions).[117] This latter rule was just relaxed by the Commission, but largely remains in effect. During the 1970's, the Commission also adopted rules limiting the ownership of common television stations and cable television systems[118], newspapers and broadcast stations[119], and telephone companies and cable television systems.[120]

While the FCC has adopted most of the rules restricting media ownership, as noted above, the Congress has been a crucial participant. The various rules adopted by the Commission were often at the instigation of the Congress. During the Commission's efforts to repeal rules, the Congress was certainly involved, either preventing repeal or in urging modification of the proposal. In addition, the Congress has codified certain Commission rules. In the 1984 Act, the Congress codified the broadcast/cable cross-ownership rule, prohibiting a person from owning both in a local market, and the telephone/cable cross-ownership rule, prohibiting a telephone company from offering cable television services (controlling the content) where it provides telephone services.[121]

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[115] FCC, *Report on Chain Broadcasting (1941)*.

[116] FCC Rule 73.3555(a).

[117] FCC Rule 73.3555.

[118] FCC Rule 76.501.

[119] FCC Rule 73.3555(c).

[120] FCC Rule 63.54.

[121] Section 613.

The Committee believes these cross-ownership rules enhance competition. To further diversify and prevent cable from warehousing its potential competition, this legislation imposes cross-ownership restrictions on cable operators. Under the bill, a cable operator cannot own an MMDS system or a satellite master antenna television (SMATV) system in its franchise area, except that waivers (1) shall be granted for cable operators already owning or having an attributable interest in these systems, or (2) can be granted if necessary to ensure that the community receives video service. When ten percent of the Nation receives some form of direct broadcast satellite service, the FCC is required to impose reasonable limitations on the ownership of such services by cable operators and other persons and to impose requirements for access to unaffiliated programmers. The legislation does not imply that any existing interest must be divested.

Franchise Decisions

The 1984 Act imposed national, uniform procedures for initial franchising and renewal decisions. The Committee received testimony, however, that those renewal provisions are unclear and difficult to administer. In the words of the Honorable Sharpe James, Mayor of Newark, "the renewal provisions are procedurally and substantively complex and severely limit the power of franchising authorities in the renewal process."[122]

To address that concern, the legislation clarifies the renewal procedures. It provides that the franchising authority has a full six months in which to complete its renewal proceedings. The legislation also clarifies that the franchising authority can revoke a cable operator's franchise for cause at any time.

Requirements for Equipment in Television Sets

Television sets are sold today with a variety of equipment. Many higher-priced sets are equipped with electronic switches that enable the viewer to switch automatically between over-the-air television stations or cable and video cassette recorders. Television manufacturers are also building more sets with multiple ports for different video inputs.

There are a variety of video distribution services that may soon be widely available, such as direct broadcast satellite service and MMDS. At that time, if television manufacturers do not install electronic switches that enable viewers to change easily from one video service to another, competition among video services may be inhibited. The Committee believes this would thwart the policies of the legislation. The legislation thus includes authority for the FCC to require the installation of such switches, provided that it determines that such switches are technically and economically feasible. Such a requirement is similar to that of the All Channel Receiver Act.[123] That law created greater competition in the video marketplace by requiring that all television sets have the ability to receive both VHF and UHF signals. Finally, the Committee notes that the presence or absence of these switches does not affect the need for must-carry requirements.

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[122] *Oversight of Cable TV*, p. 199.

[123] Public Law 87-529, approved July 10, 1962.

Limitations on Liability

The purpose of this provision is to limit the franchising authorities' liability for monetary damages for acts taken pursuant to the 1984 Act.

> The authority of cities to regulate cable television systems is increasingly challenged in court on various statutory and constitutional grounds. These lawsuits are expensive for [franchising authorities] to litigate and expose them to the possibility of extraordinary monetary judgements . . . . including compensatory damages, attorney's fees, and in some cases punitive damages.[124]

Congress reaffirmed the authority of local franchising authorities to make cable franchising decisions in the 1984 Act. In doing so, Congress never contemplated that local authorities would be subject to liability for monetary damages for carrying out the franchising process that the 1984 Act explicitly permitted to be performed. Nevertheless, in the past six years, several cities and municipalities have exercised their authority to issue fewer than all of the cable franchises requested of them, and they have been sued by parties to whom cable franchises were not issued, or who have not been issued franchises on the terms and conditions they wished.

The plaintiffs in these cases claim that the failure of the local franchising authority to grant them franchises, or the failure to issue franchises on the terms and conditions they desire, even if fully consistent with the 1984 Act, violates their First and Fourteenth Amendment rights of free speech, free press, due process, and equal protection. Based on an alleged violation of those rights, plaintiffs in these actions seek damages from franchising authorities, typically under the Civil Rights Act of 1871, 42 U.S.C. 1983, and parallel State civil rights laws as well as injunctive relief.[125]

In the aggregate, the damage claims against franchising authorities have totaled in the hundreds of millions of dollars. Whether the parties are entitled to these damages under existing law is far from clear. However, the mere pendency of these large damage claims has had significant adverse effects on the functioning of the local governments, and threatens to disrupt the local governments' ability to obtain credit, insurance, and other critical aspects of municipal governance and operation. These claims represent a potentially crippling burden on local government treasuries and their tax paying citizens as well. If successful, these claims could seriously impair, if not disrupt altogether, vital public services to their citizens.

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[124] *See*, "Legislative Proposals to Alleviate Barriers to Effective Regulatory Oversight of Cable Television Systems and to Stimulate Competition in the Provision of Cable Television Service," January, 1990, Submitted to the Commerce Committee by the City of New York, *et al.* at p. 42; *See* also, *Oversight of Cable TV*, pp. 210, 548–9. For example, cable operators have sought monetary damages, (over legal fees and attorney fees) in suits alleging that the franchise fee permitted under the act was a violation of the operators first amendment rights. In such a case the monetary damages should be limited to attorney fees and legal costs.

[125] *See e.g., Preferred Communications v. City of Los Angeles, No. 83-5846 CBM (Bx (D.C. Cal.), and Preferred Communications v. Herman,* Case No. BC 001558 (Cal. Sup. Ct. Filed May 17, 1990).

As a result, franchising authorities faced with these lawsuits are having to settle them rather than risk large judgments, over and above their legal fees. For example, the cities of Palo Alto and Atherton, CA settled a suit to protect their taxpayers from an estimated $1 million appeal and a possible $10–15 million damage assessment should they lose the appeal.[126] It is the intent of the Committee that local franchising authorities not be subject to punitive or compensatory damages for acts that are authorized under title VI of the Act and that franchising authorities not be put in the position of having to settle suits to avoid the possibility of such damages. Moreover, it is the intent of the Committee that this section apply to pending proceedings as well as any proceeding initiated after enactment of this legislation.[127]

Section 628 applies to any action expressly authorized or required by title VI, including a franchising authority's decision to grant or deny a franchise, renew or not renew a franchise, to approve or deny the transfer of a franchise, to amend or not amend a franchise, or otherwise to regulate a cable operator under title VI. The Committee does not intend to protect local franchising authorities from damages where an individual proves discrimination on the basis of race, color, sex, age, religion, national origin, or handicap.

In addition, it is not the intent of the Committee to exempt franchising authorities from punitive or compensatory damages when a court of binding jurisdiction has issued a final order, which is no longer subject to appeal, holding that the franchising authority has violated a cable operator's First Amendment rights and the franchising authority repeats or continues the violation. In other words, a franchising authority shall not be immune from damages under this provision if it knowingly violates a ruling of a court of binding jurisdiction that an action or failure to act by the franchising authority violates a cable operator's First Amendment rights.

Thus, in cases such as those pending against the City of Los Angeles [128], the City would be immune from any kind of monetary damage liability throughout the pending litigation until a final decision is rendered and all appellate review is exhausted. At that time, the municipality would have an opportunity to comply with any declaratory or injunctive relief granted and upheld on appeal. As long as the municipality complies with any declaratory or injunctive relief ultimately granted after exhaustion of appellate remedies, neither it nor its agents may be subjected to liability for monetary damages.

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[126] *See, Multichannel News*, Feb. 20, 1989, p. 23; *See also, Cable TV Law Reporter*, Sept. 26, 1989, p. 6 (the City of Dallas settled an antitrust case for $2.6 million rather than face possible treble damages), *Cable TV Franchising*, Sept. 27, 1989, p. 5 (the City of Birmingham settled a suit involving franchise fees and renewal issues rather than face an adverse district court decision).

[127] *See, Bradley v. School Board of Richmond*, 416 U.S. 696, 711 & n.14 (1974).

[128] *Preferred Communications, Inc. v. City of Los Angeles, No. 83-5846 CBM (Bx) (C.D. Cal.), and Preferred Communications, Inc. v. Herman*, Case No. BC 001558 (Cal. Super. Ct. filed May 17, 1990).

CONSTITUTIONALITY

As Oliver Wendell Holmes recognized 70 years ago, competition and First amendment values are closely linked. Policies aimed at promoting competition and preventing market abuses simultaneously advance diversity in the marketplace of ideas. The regulation of the media industry by the FCC and Congress has assumed that the media warrants treatment different than other industries. The rationale for this difference is that media ownership implicates not only issues of economic competition, but the First Amendment as well. The "products" of the mass media industry include thoughts and ideas. Members of the industry are thought to be opinion leaders, creators of social norms, purveyors of culture, and architects of the political agenda.

The Committee has consistently sought to ensure that the public will have access to many diverse and antagonistic sources of information. Much of the structural regulation of the media industry is premised on a theory that the Nation will tolerate little direct regulation of content, but that the First Amendment can be advanced by regulating the structure of the industry. The Committee believes the First Amendment implies an affirmative role for the government to encourage a diversity of voices. In some instances, the First Amendment requires the government to ensure that there will be free competition of ideas and voices.

The Committee believes that the regulation in this legislation does not conflict with the First Amendment principles of free speech and freedom of the press. Evidence demonstrates that market factors, absent government regulation, are unable to cure cable's bottleneck problems and that the Committee's approach of regulating the cable industry—under the Committee's Commerce Clause authority—is directed to the least restrictive means necessary to ensure that the public interest is served.

The cable industry argues that because cable does not use the broadcast spectrum, it should not be held to broadcast regulations and policies.[129] Cable defines itself as an electronic publisher and asserts that it should be afforded the same First Amendment protection awarded to the print media.[130]

The Committee believes that cable must be distinguished from the print media. One primary distinction that differentiates the two media is that cable must be awarded a franchise in order to operate, and similar to the telephone system, must use governmental property to string its wires, lay its cable in ducts, and obtain necessary rights of way. This distinction has been noted by the U.S. Court of Appeals:

> Common sense dictates that the number of entities that can tear up the streets or use existing poles and ducts is very limited physically. . .[131] If everyone sought to have a cable operation, the result would be a wall of wires creating chaos or interference akin to that which existed in the early days of broadcasting.[132, 133]

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[129] *See, Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 388 (1969).

[130] *See, Miami Herald v. Tornillo,* 418 U.S. 241 (1974).

[131] *See, Omega Satellite Products v. City of Indianapolis,* 694 F.2d 119, 125 (1982).

[132] *Id.* at 127.

[133] *See,* Testimony of Henry Geller, *Cable TV Consumer Protection Act of 1989,* p. 9.

In most communities served by cable, viewers have only one cable system available. It is the rare exception to find communities where two systems are competing, especially over a long period of time.

In the case of cable, the government must therefore grant franchises for speech, and the number of franchises is necessarily limited.[134]

> The central dilemma of cable is that it has unlimited capacity to accommodate as much diversity and as many publishers as print, yet all of the producers and publishers use the same physical plant. . . .If the cable system is itself a publisher, it may restrict the circumstances under which it allows others also to use its system.[135]

Consequently, the government can and should take reasonable steps to promote diversity.[136] If it were possible to permit everyone who wishes to operate a cable system to do so, there would be no need for any regulations other than of a policing or aesthetic nature as to the use of streets. However, in view of the necessarily severely limited number of franchised cable systems able to operate in any one community, it is necessary to ensure that the diversification principle (Associated Press) is not undermined in this increasingly important governmentally franchised medium. Accordingly, the Committee believes that certain structural regulations are necessary.

That is what this Committee has done by requiring the FCC to establish vertical and horizontal limitations on ownership of cable systems and to ensure effective commercial leased access, by establishing cross-ownership restrictions, and by specifying that franchising authorities may require public, educational, and government access channels.[137]

The Courts have long recognized the need for regulations designed to promote diversification in the limited electronic industry.[138] There may even be a clear analogy to the regulations of the telephone industry.[139] Like telephone, cable needs a franchise to string its wires under or over streets, and receives considerable governmental assistance in its mission. Thus, the 1984 Act not only requires a franchise, but specifies that a franchise authorizes construction over public rights-of-way and through easements, with just compensation to property owners where appropriate.[140] As with telephone service, there was initial competition in some communities, but operation has become monopolistic in nature because of apparent economies of scale. Like telephone, there is a need to ensure non-discriminatory service in the governmentally bestowed monopoly (or duopoly in some rare cases). In telephone, there is virtually complete separation of content and conduit, while in cable there is a requirement of some reasonable separation.[141]

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[134] *See, Omega, supra.*

[135] Ithiel de Sola Pool, *Technologies of Freedom* (1983), p. 168.

[136] *See, Associated Press v. U.S.*, 326 U.S. 1, 20 (1945); *FCC v. National Citizens Comm. for Broadcasting*, 436 U.S. 775 (1977).

[137] *See*, 1984 Cable Act, Secs. 611, 612, 613, 47 U.S.C. Secs. 531–533 (1988).

[138] *See, FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775, 801–02 (1975) (upholding the diversification principle in the broadcasting field.)

[139] *See*, Pool, *Technologies of Freedom*, p. 168.

[140] *See*, Secs. 621(a)(2), (b)(1); 47 U.S.C. Secs. 541 (a)(2), (b)(1) (1988); *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S.C. 419 (1982).

In light of these considerations, the Committee believes that unlike the case of newspapers, with cable there can be regulations and franchise contractual provisions to advance substantial governmental goals. In cable, these regulations or contract provisions are not content-oriented to the extent reflected in broadcasting.[142] Because it is a different service with much greater channel capacity, the cable regulations are content-neutral ones.

The proposed regulations and provisions pass constitutional muster under the standards set out in *United States* v. *O'Brien*, 391 U.S. 367 (1968). The regulations are content-neutral (they are not directed to the content of the speech) and are narrowly-tailored means to further substantial governmental interests.

Leased access and public access programming uniquely allow individuals and groups to communicate their messages to the general public. Educational access allows local schools to supplement classroom learning and to reach out to teach those who are beyond school age or unable to attend classes. The governmental channel allows for local "min-C-SPAN", thus contributing to an informed electorate, essential to the proper functioning of government. These governmental interests in a free market of ideas and an informed and well-educated citizenry certainly qualify as sufficiently important to pass the first hurdle of the *O'Brien* incidental burden test.[143]

The regulations can also readily meet the second criterion of being narrowly tailored. They are content-neutral and should specify only a reasonable amount of channel capacity for access by other parties. Section 612 on its face is reasonable in this respect; whether particular PEG allocations are reasonable would depend on the facts of each case. For example, an allocation of a least three channels on most systems would certainly appear reasonable. This particularly so with the provison that unused PEG channels must be allowed to be used by the cable operator for other purposes.[144]

As reported in the "Cabinet Committee on Cable Communications, Report top the President," 15 (1974):

> Cable development has the potential of creating an electronic medium of communications more diverse, more pluralistic, and more open, more like the print and film media than our present broacast system. It could provide minority groups, ethnic groups, the aged, the young, or people living in the same neighborhood an opportunity to express, and to see expressed, their own views.

In an attempt to cope with ever-changing and constantly increasing problems of the booming cummunications industry, the Committee has formulated the legislation to ensure that the public interest, convenience, and necessity is served while allowing the cable industry and opportunity to develop to its maximum potential.

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[141] *See*, 1984 Cable Act, Sec. 612, 47 U.S.C. Sec. 532 (1988).

[142] *See Red Lion, supra.: Office of Communication of the United Church of Christ v. FCC*, 707 F.2d 1413 (D.C. Cir. 1983); Compare Sec. 624(f) of the Act.

[143] *See*, H. Report No. 98-934, supra, at 30.

[144] *See*, 1984 Cable Act, Sec. 611(d); 47 U.S.C. Sec. 531(d) (1988).

Constitutionality: Must-Carry and Channel Positioning

The FCC previously has failed to sustain must-carry regulations before the U.S. Court of Appeals for the District of Columbia. We believe that previous court decisions do not foreclose Congress from enacting constitutional must-carry and channel positioning rules.

First, a close reading of the cases reveals that they did not foreclose the enactment of must-carry and channel positioning legislation that is based on a sound factural predicate. In *Quincy,* the court stated that "we have not found it necessary to decide whether any version of mandatory carriage would contravene the First Amendment." [145] The court's primary concern in reviewing the FCC's first must-carry rules was that the Commission "failed to adequately demonstrate that an unregulated cable industry poses a serious threat to local broadcasting, and more particularly, that the must-carry rules serve to alleviate that threat." [146] The court further observed that "[s]hould the Commission move beyond its 'more or less intuitive model', as it clearly has the capacity to do, we would be extremely hesitant to second-guess its expert opinion." [147]

Unfortunately, when the Commission adopted its second, interim must-carry regime, it failed again to articulate a coherent rationale to justify the rules. The Commission abandoned its traditional localism rationale in favor of a theory based on educating the American public about the need to retain off-air transmission capacity and use of an A/B switch. The failure to articulate a substantial governmental interest for the second set of must-carry rules was noted by at least one Commissioner and ultimately the U.S. Court of Appeals. Nevertheless, the court found that must-carry rules were not *per se* unconstitutional and that the government was not precluded from regulating the cable industry so as to advance a substantial governmental interest. Again, the court admonished the Commission to "produce either empirical support or at least sound reasoning on behalf of its measures." [148] Because the Commission's rationale differed substantially from traditional communications policy concerns, the court's admonishment as precedential value in this context appears limited.

In adopting the 1984 Act, the House Energy and Commerce Committee observed that "[a]t the same time, in adopting this legislation, the Committee is concerned that Federal law not provide the cable industry with an unfair competitive advantage in the delivery of video programming." [149] A cable system, however, is a conundrum in that it competes with local television broadcast stations; yet, when it provides service to a home, it almost always becomes the sole source of video programming. The Committee believes, as a matter of economics, and consistent with our authority under the Commerce clause, that intervention is necessary to facilitate a healthy competitive environment between the broadcast and cable industries. We recognize that cable systems have been accorded a degree of First Amendment protection.[150] However, this fact alone does not immunize the industry from regulatory oversight that is intended to promote competition and diversity of voices. Generic economic regulation that facilitates diversity of voices is fully consistent with First Amendment principles.[151] Indeed, as applied to communications media, generic economic regulation designed to facilitate competition and diversity of viewpoints has been sustained.[152]

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[145] *Quincy Cable TV v. FCC,* 768 F.2d 1434 (D.C. Cir. 1985).

[146] *Id.* at 1459.

[147] *Id.*

[148] *Century Communications Corporation v. FCC,* 835 F.2d 292, 304 (D.C. Cir. 1987), clarified 837 F.2d 517 (D.C. Cir. 1988).

[149] House Rept. No. 98–934, p. 70.

The Committee acknowledges that restoration of a competitive marketplace must necessarily involve more than carriage of local broadcast signals by cable operators. It has become abundantly clear that cable's ability to reposition or shift local broadcast stations provides it with a mechanism to impair competition in the marketplace. We believe it is essential that local broadcast stations be granted stable and permanent channel positions. Since the demise of the must-carry rules in 1985, many in the cable industry have taken full advantage of their power to reposition local broadcast stations. In other contexts, rules prohibiting such anti-competitive "screen bias" have been sustained.[153] The Committee believes that remedial actions are appropriate as part of ensuring future competition in the marketplace. Accordingly, it is appropriate to permit local broadcast stations to choose among the channels they occupied as of July 19, 1985—the date the must-carry rules were struck down in Quincy—its off-air channel, or another channel as agreed upon with the cable operator.

The carriage and channel positioning regulations facilitate the substantial governmental interest in preserving local off-air television. The concept of localism has been the foundation of communications policy. Pursuant to section 307(b) of the Act, the Federal Government has established a system of television broadcast allocations. The integrity of this allocation system is essential to the maintenance of a free over-the-air television broadcast system that serves all Americans. The Supreme Court has consistently held that localism represents a substantial governmental interest.[154] More recently, the Supreme Court stated, "[t]here can be little doubt that the comprehensive regulations developed over the past 20 years by the FCC to govern signal carriage by cable television systems reflect an important and substantial federal interest."[155] The U.S. Court of Appeals for the Seventh Circuit recently agreed, stating that "[e]ncouragement of 'localism' certainly qualifies as an important or substantial interest."[156]

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[150] *See City of Los Angeles v. Preferred Communications Inc.*, 476 U.S. 488 (1988).

[151] *See, e.g., Associated Press v. United States*, 326 U.S. 1 (1945); *United States v. Paramount Pictures*, 334 U.S. 131, 166 (1948).

[152] *FCC v. National Citizens Committee for Broadcasting*, 436 U.S. 775 (1978).

[153] *See, United Airlines v. Civil Aeronautics Board*, 766 F.2d 1107 (7th Cir. 1985).

[154] *See, United States v. Southwestern Cable Co.*, 392 U.S. 157, 173, 174, 177 (1968); *United States v. Midwest Video Corporation*, 406 U.S. 649, 669, 670 (1972).

[155] *Capital Cities Cable Inc. v. Crisp*, 467 U.S. 691, 714 (1984).

[156] *Chicago Cable Communications v. Chicago Cable Commission*, 879 F.2d 1540, 1549 (7th Cir. 1989).

While the *Quincy* court struck down the Commission's first must-carry rules, it did not find that localism was not a substantial governmental interest. It only found that the Commission lacked sufficient evidence to move beyond the more or less intuitive model.[157] Because the Commission's subsequent must-carry rules were not predicated on the concept of localism, the Court of Appeals in *Century* never confronted this issue.

Absent must-carry and channel positioning requirements, the system of local over-the-air broadcasting is threatened. In this regard, the Committee's concern is for those who do not subscribe to cable television. For these citizens—over 40 percent of the population—local off-air television broadcasting is their only video choice for obtaining news and information. There is a substantial governmental interest in ensuring that diverse viewing options are maintained for these individuals.

The Committee also notes that its interest in promoting localism extends to the ability of cable subscribers to access local broadcast signals. From the start, the carriage rules have reflected the concern that cable subscribers would be denied access to federally-allocated broadcast stations in the absence of must-carry rules.[158] Unfortunately, this important aspect of localism was never addressed adequately by the *Quincy* court. Instead, the Court appears to have focused on questions regarding the economic viability of broadcasting for which the Commission, at that time, had little evidence.

Of critical importance to this aspect of localism is the ability of cable subscribers to receive local television stations on all television sets. The Committee notes that cable technology does not necessarily ensure that local broadcast signals can be received on all television sets connected to cable television. The fundamental goals of localism cannot be met if the subscribers are unable to receive signals because of their channel positioning. Cable subscribers should not have to pay for additional converters to receive local broadcast signals. Such a policy would be inconsistent with the spirit of section 303(s) of the Act, which requires that all television be capable of receiving all television broadcast frequencies. Therefore, consistent with the Committee's statutory objectives promoting localism and the All Channel Receiver Act, local broadcast stations should, to the maximum extent possible, be carried on channel positions that can be received on all television sets.

The Committee also recognizes the unique and substantial Governmental interest in ensuring that cable subscribers maintain access to non-commercial educational stations. Congress has expressly authorized and supported such facilities.[159] The record before the Committee demonstrates that many of these stations have been systematically denied carriage by cable operators. The provisions contained in this section will ensure that cable subscribers retain access to these signals.

In summary, the carriage and channel positioning requirements of the legislation advance three longstanding governmental interests: (1) the public's First Amendment right of access to diverse sources of information; (2) the preservation of competition among video programming distributors; and (3) the promotion of a nationwide broadcasting service built upon local outlets—one of the FCC's statutory obligations.

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[157] *Quincy Cable TV Inc.*, v. *FCC*, 768 F.2d 1434, 1459 (D.C. Cir. 1984).

[158] *See, First Report and Order CATV Rules*, 38 FCC 683, 705 (1965); *Second Report and Order 2 FCC2d 725, 736 (1966).*

[159] *See*, 47 USC 396 (a)(5).

LEGISLATIVE HISTORY

S. 1880, the Cable Television Consumer Protection Act, was introduced by Senator John C. Danforth, the Committee's Ranking Republican Member, on November 15, 1989. The Committee held two hearings on S. 1880 and the Committee staff draft substitute (authorized for release by Senators Hollings, Inouye, and Danforth).

In all, the Committee has held ten days of hearings on cable and cable-related issues in this Congress. Three hearings were held in June, 1989 on the issue of competition in the video programming industry. These were followed by two hearings in October 1989: *Commercial Time on Children's Cable TV* and *Must Carry*. On November 16 and 17, 1989, the Committee held two hearings on *Oversight of Cable TV* (and the 1984 Act). In March 1990, a hearing was held on the FCC's reinstatement of the "syndicated exclusivity" and network nonduplication rules.

In its hearings, the Committee also considered provisions contained in:

S. 168, the Cable Television Programming Competition and Consumer Protection Act, introduced by Senator Pressler;

S. 833, the Cable Television Subscriber Protection Act, introduced by Senator Metzenbaum;

S. 905, the Cable Consumer Protection Act, introduced by Senator Lieberman; and

S. 1068, the Cable Competition Act, introduced by Senator Gore.

On June 7, 1990, the Committee, by a vote of 18–1, ordered S. 1880 reported favorably, adopting an amendment in the nature of a substitute. The text of the substitute was authored by Senators Hollings, Inouye, and Danforth. To this text were added three amendments: (1) to encourage the carriage of low power television stations on cable systems if such stations air locally produced programming (Senator Ford); (2) to strike a finding which stated that exclusivity is a legitimate competitive strategy, to insert the words "a direct broadcast satellite service" in the definition of multichannel video programming distributor, and to require the sale of cable programming carried on satellites (C-Band only) to home satellite dish users (Senator Gore); and (3) to require that cable operators not discriminate against unaffiliated programmers (Senator Pressler).

SUMMARY OF MAJOR PROVISIONS

SECTION 5.—RATE REGULATION

The test for determining whether cable systems are subject to effective competition is made more stringent than existing FCC regulations. It requires that there be both a sufficient number of television signals and a multichannel video competitor prior to deregulation. If cable systems are not subject to competition, the FCC shall ensure that rates for basic cable service (the tier with retransmitted television signals), as well as the equipment used for the provision of that service, are reasonable. In addition, the FCC, upon complaint, shall ensure that rates for other (non-basic and not offered on a per channel or per program basis) cable services are not significantly excessive. Franchising authorities can obtain jurisdiction over basic rate regulation by certifying to the FCC that it will follow the FCC's procedures and standards. If the franchising authority does not follow these FCC requirements, its rate regulation authority will be revoked.

SECTION 6.—PROGRAM DISTRIBUTION AND EXCLUSIVITY

National cable programmers affiliated with cable operators cannot unreasonably refuse to deal with other video distributors. In addition, such programmers cannot discriminate in prices, terms, and conditions in the sale of programming to others if such discrimination would have the effect of impeding retail competition. Further, any such programmer must deal with cable operators and buying agents of cable operators on similar terms, but may take into account cost differentials as well as certain other factors. Cable operators cannot discriminate against unaffiliated cable programmers or require that a programmer give the operator a financial interest in the programmer as a condition of carriage. Finally, cable programmers who encrypt their satellite transmissions (C-Band) must make their programming available to home satellite dish owners.

SECTION 7.—LEASED ACCESS

The substitute gives the FCC the authority to establish rates, terms, and conditions for access to these channels, including for billing and collection.

SECTION 8.—LIMITATIONS ON CONTROL AND UTILIZATION

The FCC is required to conduct a rulemaking to prescribe reasonable limitations on (1) the number of subscribers a cable operator can reach nationwide, and (2) the number of channels that can be occupied on a cable system by programmers affiliated with a cable operator.

SECTION 9.—CROSSOWNERSHIP

A cable operator cannot own a MMDS system or a satellite master SMATV system in its franchise area, except that waivers can be granted. When approximately 10 percent of the Nation receives some form of direct satellite video service, the FCC is required to impose (A) limitations on the ownership of such services by cable operators and other persons having media ownership interests, and (B) access requirements for unaffiliated programmers.

SECTION 10.—CUSTOMER SERVICE

The FCC is required to examine current industry standards to determine whether they sufficiently provide customers with adequate service. If they do not, the FCC shall adopt requirements. Current State laws are left in effect.

SECTION 11.—FRANCHISE RENEWAL

The bill as reported makes a series of changes to the procedural requirements in the Act.

SECTION 12.—REQUIREMENTS FOR EQUIPMENT IN TELEVISION SETS

The FCC is given the authority—if it demonstrates technical and economic feasibility—to require television set manufacturers to include electronic switches to permit users to change readily among all video distribution media.

SECTION 13.—LIMITATIONS ON FRANCHISING AUTHORITY LIABILITY

If franchising authorities act pursuant to the provisions of this Act, they may be subject only to injunctive relief, declaratory relief, and attorneys' fees and legal costs for claims asserting First Amendment rights.

SECTION 14.—MINIMUM TECHNICAL STANDARDS

The FCC is required to establish minimum technical standards for the operation of cable systems.

SECTION 15.—REQUIREMENT TO CARRY LOCAL BROADCAST SIGNALS

This provision reinstates the requirements that cable systems carry local broadcast signals.

SECTION 17.—HOME WIRING

The FCC is required to prescribe rules concerning the disposition of cable-installed wires inside a home when the subscriber terminates service.

Estimated Costs

In accordance with paragraph 11(a) of rule XXVI of the Standing Rules of the Senate and section 403 of the Congressional Budget Act of 1974, the Committee provides the following cost estimate, prepared by the Congressional Budget Office:

U.S. Congress,
Congressional Budget Office,
Washington, DC, July 17, 1990.

Hon. Ernest F. Hollings,
Chairman, Committee on Commerce, Science, and Transportation, U.S. Senate, Washington, DC.

Dear Mr. Chairman: The Congressional Budget Office has prepared the attached cost estimate for S. 1880, the Cable Television Consumer Protection Act of 1990.

If you wish further details on this estimate, we will be pleased to provide them.

Sincerely,

Robert D. Reischauer, *Director.*

CONGRESSIONAL BUDGET OFFICE—COST ESTIMATE

1. Bill number: S. 1880.

2. Bill title: Cable Television Consumer Protection Act of 1990.

3. Bill status: As ordered reported by the Senate Committee on Commerce, Science, and Transportation, June 7, 1990.

4. Bill purpose: S. 1880 would require the Federal Communications Commission (FCC) to prescribe rules and regulations regarding various operations of the cable television industry. The bill would require the FCC or local governments to review and regulate rates charged by cable television systems for certain services.

5. Estimated cost to the Federal Government:

[By fiscal year, in millions of dollars]

	1991	1992	1993	1994	1995
Estimated authorization level	15	10	8	7	7
Estimated outlays	14	10	8	7	7

The costs of this bill fall within budget function 376.

Basis of Estimate: For the purposes of this estimate, it is assumed that S. 1880 will be enacted late in fiscal year 1990 and that the necessary funds would be appropriated for fiscal year 1991 and subsequent years. It is further assumed that the FCC and local authorities would share equally the responsibility for regulating the rates of cable systems that are subject to regulation. Outlays have been estimated on the basis of information from the FCC and historical spending patterns.

Regulation of Rates for Basic Cable Service: Section 5 would require the FCC to ensure that rates charged for basic service by cable systems that are not subject to effective competition are reasonable. Specifically, the bill would require the FCC to issue a rule within 120 days of enactment that would provide guidelines and standards for establishing reasonable rates for these operators. The bill would require the FCC to regulate basic service rates and review rate increase requests; the FCC would be authorized to delegate these functions to local franchising authorities (municipal or county governments) at their request and if their local laws and regulations comply with the guidelines and standards established by the FCC. In addition, S. 1880 would require the FCC to prescribe criteria by which to determine whether rates are excessive and to decide whether rates are excessive in response to specific complaints.

Based on information from the FCC, CBO estimates that it would cost the FCC about $14 million in fiscal year 1991 to conduct rate regulation activities. The costs would decrease to $5 million in 1992 and decline to an annual ongoing cost of about $2 million in 1994 and 1995. This estimate assumes that the FCC would perform moderately detailed reviews of requests from local authorities and of the reasonableness of basic service rates and that the initial reviews would be concentrated in the first year. It also assumes that localities would opt to regulate the basic rates of about half the cable systems. The cost to undertake rate regulation activities could vary from this estimate depending on the level of review by the FCC—from as low as $7 million in 1991 to as much as $22 million.

Additional Regulations: S. 1880 also would require the FCC to establish rules and regulations for other areas of cable television operation, including: distribution of video programming, leased commercial access, ownership, equipment, and technical standards. The bill would require the FCC to examine cable industry standards for customer service and to establish standards if they do not exist or are not effective. CBO estimates that these requirements would result in costs of $1 million in fiscal year 1991. In subsequent years, the costs would rise to $4 million to $5 million annually.

6. Estimated costs to State and local governments: S. 1880 would allow the FCC to delegate responsibility for regulating the rates charged by cable operators for basic service to local franchising authorities. Localities would not be required to assume this responsibility, but could do so if they met certain guidelines. Based on information from the FCC, CBO expects that many local governments would request this responsibility and that the FCC would delegate this activity for half of all cable franchises without effective competition. As a result, CBO estimates that about 13,000 local authorities would regulate basic cable service rates.

The cost to an individual locality to regulate basic cable service rates is not likely to be significant. Some would require additional staff to examine rates and rate increase requests according to guidelines issued by the FCC. The cost to any particular jurisdiction could vary depending on the complexity of the FCC's rules and the ability of existing staff to absorb the new workload. If localities were to incur costs to regulate rates that are similar to those that would be incurred by the FCC, they would spend, in aggregate, between $5 million and $10 million each year. Because local interest in cable rates may be more intense, it is possible that localities would spend somewhat more than this.

7. Estimate comparison: None.

8. Previous CBO estimate: None.

9. Estimate prepared by: Laura Carter.

10. Estimate approved by: James L. Blum, Assistant Director for Budget Analysis.

REGULATORY IMPACT STATEMENT

In accordance with paragraph 11(b) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following evaluation of the regulatory impact of the legislation, as reported.

S. 1880, as reported, contains a series of FCC requirements and will subject the cable industry to greater oversight by the government. The rate regulation provision in the legislation overlaps to some extent with current law in providing for the regulation of basic cable service. This service is now largely unregulated, but the Commission has a pending proceeding that may subject most cable systems to rate regulation by franchising authorities. The legislation makes it certain that virtually all cable systems will have their basic service rates regulated. The rate regulation provision also requires the FCC, upon complaint, to ensure that rates for most other cable programming services are not significantly excessive. This will impose a greater regulatory burden on the FCC and cable operators not subject to effective competition. The Committee believes the Commission should carry out this obligation consistently with the policies of the legislation and with the least amount of regulation necessary to accomplish this goal.

The legislation in the nondiscrimination in programming provision subjects cable programmers to many requirements to ensure they will not act anticompetitively. The FCC is required to adopt rules to carry out this provision and must oversee complaints. The Committee believes that there will be a greater regulatory burden on the Commission because of this provision, but since it is uncertain how many complaints will be filed and how quickly the Commission can resolve them, the extent of the regulatory burden cannot be precisely calculated.

The legislation requires the Commission to conduct rulemakings: for leased access channel rates, terms, and conditions; to establish horizontal and vertical integration limitations; to ensure there are adequate customer service standards; to establish minimum technical service requirements; and to establish rules for home wiring. While the Commission is now gathering information on the integration issues, all of these rulemakings will have to be initiated and completed within a relatively short time, about one year. The Committee recognizes this will require the FCC and outside parties to expend many resources. After the Commission adopts rules, the cable industry will have to comply with them. Many cable companies are already meeting some, if not most, of these requirements. There, however, will still be increased regulatory oversight of the cable industry. The Commission expects this oversight to be kept to the minimum necessary to carry out the purposes and policies of the legislation.

NUMBER OF PERSONS COVERED

The legislation subjects most of the cable systems and cable programmers to various levels of regulatory oversight. For example, the legislation requires that cable systems not subject to effective competition have their rates for basic service and cable programming service subject to governmental oversight. In addition, the legislation requires that cable programmers owned or controlled by cable operators not unreasonably refuse to deal with other video distributors and not discriminate between different video distributors if such discrimination would impede retail competition.

ECONOMIC IMPACT

There is little doubt that the legislation will have some economic impact. The major objective of the legislation is to control the market power of the cable industry so it does not harm consumers, programmers, and competitors. At the same time, the Committee has sought to impose the minimal amount of governmental oversight necessary to accomplish this goal. The Committee is cognizant of the cable industry's success in developing greater capacity on cable systems and in expanding the number of programming services. The Committee wants this growth to continue. While it is clear that cable systems face little or no competition today, the Committee encourages entry by competitors. When such competition develops, the legislation provides for the termination of most government oversight and permits market forces to operate unfettered.

PRIVACY

The legislation will not have any adverse impact on the personal privacy of the individuals covered.

PAPERWORK

As discussed above, the legislation requires the FCC to conduct a number of rulemakings to implement its provisions. Thus, the bill will increase the paperwork burden on the cable operators, programmers, and other interested parties who will file comments with the FCC. The bill imposes no regular reporting requirements on any company.

SECTION-BY-SECTION ANALYSIS

SECTION 1.—SHORT TITLE

This section contains the short title of the bill, the "Cable Television Consumer Protection Act of 1990."

SECTION 2.—FINDINGS

This section contains findings of Congress, which may be summarized as follows:

(1) cable rates have increased significantly;

(2) without a sufficient number of local television stations and another multichannel video programming distributor, cable systems are not subject to effective competition;

(3) there is a substantial governmental and First Amendment interest in promoting a diversity of views through multiple technology media;

(4) the cable industry has become a dominant nationwide video medium;

(5) the cable industry has become more concentrated;

(6) cable rates should be regulated only when needed to control undue market power;

(7) the cable industry has become more vertically integrated into programming, which may harm competing programmers;

(8) there is a substantial governmental and First Amendment interest in ensuring that cable subscribers have access to local noncommercial educational stations to encourage the growth and development of quality public telecommunications services;

(9) there is a substantial governmental interest in ensuring the continuation of locally originated television broadcasting;

(10) television stations are an important source of local programming, especially for local news and public affairs programming;

(11) television broadcasting is especially important for those who cannot afford to pay for video programming;

(12) over the past decade, the market share of cable television has increased, while that of television broadcasting has decreased;

(13) cable television and television broadcasting increasingly compete for advertising, and more advertising is aired on cable television;

(14) by carrying television broadcast stations, cable operators are increasing the viewership of these stations at the expense of programming aired exclusively on cable systems;

(15) as a result, cable operators have an incentive not to carry television broadcast stations, which may jeopardize the future of these stations and the local programming they air;

(16) subscribers to cable television often do not have the equipment making it easy to switch between viewing cable television and television broadcast signals over-the-air;

(17) cable systems are often the single most efficient distribution system for television programming;

(18) the compulsory license was created by Congress as part of a delicate balance between cable systems and television broadcast stations that included mandatory carriage obligations for cable systems; however, with the elimination of that requirement, there is a competitive imbalance between the two industries;

(19) franchising authorities had their authority to oversee the cable industry limited by the 1984 Act, especially during franchise renewals;

(20) given the lack of clear guidelines in applying the First Amendment to cable franchise decisions, franchising authorities are unreasonably exposed to liability for monetary damages under the Civil Rights Acts; and

(21) cable systems should be encouraged to carry low power television (LPTV) stations in certain cases.

Regarding this last finding, the Committee notes that the legislation requires that cable operators carry certain full power television stations. The Committee, however, observes that some cable systems never carry LPTV stations, no matter what their programming and regardless of whether the cable systems viewers have access to any other local programming or whether the cable operator has excess capacity available. In some parts of the country, there are few if any local full power stations. As a result, the residents of those communities have limited access to local programming. LPTV stations sometimes fill this void, by providing local news and public affairs programs. In such situations, the Committee believes cable systems should whenever possible carry those LPTV stations that provide a significant amount of local programming.

This finding encourages cable systems to carry LPTV stations licensed to serve the franchise area, where the LPTV station creates and broadcasts local programming as a substantial part of its program day.

By encouraging the carriage of certain LPTV stations, the Committee does not intend to alter any of the FCC's rules and regulations concerning LPTV and its relationship to full power television stations. Moreover, the Committee does not intend that a cable operator elect to carry an LPTV station in place of a local full power station. Finally, in no event, should this language be interpreted as encouraging the carriage of LPTV or translator stations that merely retransmit the signal of another full power station.

SECTION 3.—STATEMENT OF POLICY

This section states the policy of Congress. Briefly stated, that policy is to:

(1) promote information diversity;

(2) rely on the marketplace, to the maximum extent;

(3) ensure that cable systems and cable programming can continue to grow and develop;

(4) regulate where effective competition does not exist; and

(5) ensure that consumers and programmers are not harmed by undue market power.

SECTION 4.—DEFINITIONS

This section amends section 602 of the Act to add the following:

(1) The term "activated channels" means those channels engineered at the headend of a cable system for the provision of services generally available to residential cable subscribers, regardless of whether such services actually are provided, including access channels.

(3) The term "available to a household" or "available to a home" when used in reference to multichannel video programming distributor means a particular household which is a subscriber or customer of the distributor or a particular household which is actively and currently sought as a subscriber or customer by a multichannel video programming distributor.

(6) The term "cable community" means the households in the geographic area in which a cable system is authorized by a franchising authority to provide cable service, regardless of whether the cable operator is actually providing cable service to such households.

(14) The term "headend" means the location of any equipment of a cable system used to process the signals of television broadcast stations for redistribution to subscribers.

(15) The term "multichannel video programming distributor" means a person who makes available for purchase, by subscribers or customers, multiple channels of video programming; further, the term "a direct broadcast satellite service" used in this definition is not intended to be limited only to the FCC's authorized Direct Broadcast Satellite service, but is intended to include all satellite transmissions direct to home receivers regardless of frequency, including C-Band and Ku-Band; examples of multichannel video providers include wireless cable and satellite master antenna television.

(18) The term "principal headend" means—(A) the headend, in the case of a cable system with a single headend, and (B) in the case of a cable system with more than one headend, the headend designated by the participating operator as the principal headend, except that such designation shall not undermine or evade the requirements of section 614 of the Act.

(20) The term "qualified commercial station" means any television broadcast station which is not a qualified noncommercial educational television station and which is determined by the Commission to be a commercial station; while such term does not include LPTV stations, television translator stations, and other passive repeaters, the Committee believes that cable systems should carry LPTV stations that broadcast a substantial amount of local programming.

(21) The term "qualified local broadcast station" means any television station licensed and operating on a channel regularly assigned to its community by the Commission (except where such station would be considered a distant signal under section 111 of title 17, U.S.C.) that, with respect to a particular cable system (A) is licensed to a community whose reference point is within 50 miles of the principal headend and which delivers to the principal headend either a signal level of −45 dBm (UHF) or −49 dBm (VHF) at the input terminals of the signal processing equipment or a baseband video signal, and (B) is either a qualified commercial or noncommercial educational television station.

(22) The term "qualified noncommercial educational television station" means any television broadcast station which (A) under FCC rules is eligible to be licensed by the FCC as a noncommercial educational television station and which is owned and operated by a public agency or a nonprofit private entity, or (B) is owned or operated by a municipality and transmits only noncommercial programs for educational purposes; such term includes translators in particular circumstances.

(25) The term "usable activated channels" means activated channels of a cable system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations as determined by the FCC.

(26) The term "video programmer" means a person engaged in the production, creation, or wholesale distribution of a video programming service for sale. This term applies to those video programmers who enter into arrangements with cable operators for carriage of a programming service. For example, the term appliies to HBO but not to those persons who sell movies and other programming to HBO. It applies to pay-per-view service but not to the supplier of the programming for this service.

SECTION 5.—REGULATION OF RATES

This section amends section 623 of the Act as follows:

(a) No governmental authority can regulate the rates for the provision of cable service or for the installation or rental of cable equipment, except to the extent provided in section 623 and section 612 of the Act. In addition, franchising authorities may regulate the rates for the provision of cable service, or any other communications services provided over a cable system, but only to the extent provided in this section.

In this section, discussion of the regulation of rates refers to the retail rates charged subscribers. It does not refer to the wholesale rates paid to programmers by cable operators.

(b)(1) The FCC shall regulate the rates, terms, and conditions for basic cable service on cable systems not subject to effective competition to ensure these rates are reasonable. The FCC's authority shall also extend to the rates, terms, and conditions for installation or rental of equipment, such as converters and remote controls, used for the receipt of basic cable service.

The Committee recognizes that there is no history of establishing rates for cable service that is analogous, for example, to the process used in the telephone industry. This provision, therefore, gives the Commission broad discretion to ensure rates are reasonable. The Commission can establish rates by broad category and only deal with individual systems when special circumstances exist. In overseeing rates, the Commission shall ensure they reflect the number of over-the-air signals and other programming carried on the tier as well as other local circumstances.

(2) The franchising authority may obtain this jurisdiction if it adopts laws and regulations conforming to FCC procedures, standards, requirements, and guidelines. The FCC shall review promptly the franchising authority's written request to ensure that these State or local laws and regulations do in fact comply with its procedures, standards, requirements, and guidelines and that they provide a level of protection to consumers required by the Commission and that carry out the policy of title VI of the Act. Upon petition by a cable operator or other interested party, the FCC shall review the regulation of rates by a franchising authority. If the FCC finds that the franchising authority has acted inconsistently with its requirements, it can grant appropriate relief. If the FCC determines that State or local laws and regulations are no longer in conformance with the FCC requirements, it shall revoke the authorization. The FCC shall restore a franchising authority's rate regulatory power revoked under this subsection once the requirements of this subsection are satisfied.

(3) A cable operator has no obligation to put programming other than retransmitted local broadcast signals on this basic service tier. Any obligation imposed by operation of law or contract inconsistent with this subsection is preempted and may not be enforced. If a contract is inconsistent and is abrogated and such contract requires carriage on the basic service tier or its equivalent, the Committee intends that the obligations undertaken pursuant to such contract shall require carriage on the next most widely subscribed-to tier of service.

In addition, under this provision, any obligation or requirement imposed by a franchise authority—whether by regulation or contract—that is inconsistent with this provision would be preempted and rendered unenforceable.

(4) The FCC shall adopt regulations to implement this section within 120 days of the date of enactment.

(5) A cable operator may file for a rate increase, and such increase shall be granted if it is not acted upon within 180 days of the date of filing. This subsection does not prevent the cable operator from agreeing to extend the period for a decision on its request.

(c)(1) For systems not subject to effective competition, the FCC shall establish reasonable rates for cable programming services (other than basic service and except for that offered on a per channel or per program basis) if it finds the current rates are significantly excessive. The FCC may act only upon a complaint that is filed within a reasonable time after a rate increase—no matter how minimal the increase may be—and that properly establishes that rates are significantly excessive. These rates may be significantly excessive prior to the passage of the legislation, and the Committee intends that these rates be subject to this provision. However, the Commission shall not review such rates until it receives a properly filed complaint. Prior to establishing reasonable rates, the Commission shall inquire of the cable operator as to the reason for such rates and then determine whether the existing rates can be justified by reasonable business practices.

Significantly excessive"[160] rates are those that are definitely above those that would occur under effectively competitive conditions. The Committee has derived this standard because it recongizes that: (1) for cable systems not subject to effective competition, the degree of market power varies from system to system; (2) there is not a history of regulating cable's rates based on some systematic consideration of costs, rates, and returns; (3) even systematic regulation is not a precise science and imposes costs on consumers; and (4) a national scheme of regulation is required but has practical limits in light of the number of cable systems. The Committee therefore has decided that it is best to include a standard that brought under government oversight those rates that are, with some certainty, unreasonable and above the rates for similarly situated systems.

Since the legislation requires cable operators to separate basic from other cable programming services, during a transition time, there may be confusion as to what constitutes "a rate increase for cable programming service". For example, since cable programming service is defined to exclude both basic and per program and per channel offerings, a cable operator could argue that the price of programming previously bundled in an expanded basic tier, which is now separately priced under a regulated basic service tier or at an unregulated per program or per channel rate, should not be considered in determining whether cable programming service rates have increased. Such an interpretation of the term "increase" would clearly thwart the intent of the legislation. That interpretation would permit cable operators to use monopolistic conditions triggering regulation to retier programming to avoid regulatory scrutiny. To prevent this result, the FCC should ensure that rates for similar programming are compared over time to determine whether cable programming service rates have increased.

(2) Within 180 days after the date of enactment, the FCC shall establish criteria for determining when rates are significantly excessive and whether complaints filed within a reasonable time

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[160] According to *The Random House College Dictionary, Revised Edition* (1984), the word "significantly" means "important; of consequence" (at p. 1224) and the word "excessive" means "exceeding the usual or proper limit or degree" (at p. 460).

after a rate increase properly establish that rates are significantly excessive.

(3) In establishing criteria for determining whether rates are significantly excessive, the Commission shall consider any factor relevant to its public interest determination, including—

(A) the extent to which service offerings are offered on an unbundled basis;

(B) rates for similarly situated cable systems offering comparable services;

(C) the history of rates for such service offerings of the system; and

(D) the rates for all cable programming service offerings taken as a whole.

(d) A cable system in a community in which fewer then 30 percent of the households subscribe to the cable system is deemed to be subject to effective competition. A cable system with penetration greater than 30 percent is subject to effective competition if there are (1) a sufficient number of local television signals, and (2) the presence of a multichannel video competitor that is available to a majority of the homes in the market and is subscribed to by individuals in at least 15 percent of the homes. In determining whether a "sufficient number" of broadcast signals exists, the FCC should consider the number and technical quality of broadcast signals received in the community. The FCC shall periodically review and update the rules it establishes pursuant to this section to reflect changes in the communications marketplace.

(e) This is identical to section 623(f) of the existing statute. See, the House Energy and Commerce Committee "Report on the Cable Franchise Policy and Communications Act of 1984" (98-934), p. 68.

(f) Cable programming service is defined as all video services, other than those offered on the basic service tier, not offered on a per channel or per program basis.

This provision along with subsection (c) and the colloquy by Senators Hollings and Kerry at the Committee Executive Session demonstrate the Committee's belief that greater unbundling of offerings leads to more subscriber choice and greater competition among program services. Through unbundling, subscribers have greater assurance that they are choosing only those program services they wish to see and are not subsidizing programs they do not desire. With bundling, programmers have an incentive to spend more knowing that the cost will be spread across those who do not watch such programming.

The Committee also recognizes that there can be legitimate reasons, albeit limited, for bundling. For example, there may also be a need to nurture certain offerings or help market them by exposing them to more subscribers. For example, the television networks carry this out by placing a new program between already highly rated shows. Many of these objectives could be carried out through means other than bundling large amounts of programs together, few of which any single subscriber wants.

Finally, it is important to note that only about one-quarter of all cable systems are addressable, having the technology to isolate all channels. While this number will increase as new cable plant is built, there will still be, even in five years, a substantial number of cable systems that are not addressable. This will unfortunately inhibit the Committee's objective, and the Committee urges the creation of this capability.

In sum, one of the prime goals of the legislation is to enhance subscriber choice. Unbundling is a major step in this direction. Cable operators and programmers are urged to work toward this objective, while also seeking to accomplish other legitimate goals.

SECTION 6.—NONDISCRIMINATION WITH RESPECT TO VIDEO PROGRAMMING

This section adds a new section 640 to the Act:

(a) The Committee considers this provision to be crucial to the development of competition to cable. Under this provision, a national cable programmer in which a cable operator has an attributable interest shall not unreasonably refuse to deal with any multichannel video distributor; and a national cable programmer in which a cable operator has an attributable interest shall not discriminate in price, terms, and conditions among multichannel video distributors if such action would have the effect of impeding retail competition.

In determining what is an attributable interest, it is the intent of the Committee that the FCC use the attribution criteria set forth in 47 CFR section 73.3555 (notes) or other criteria the FCC may deem appropriate.

As noted above, during the Committee's deliberation on this measure, the Committee decided to strike a finding that exclusivity is a legitimate competitive strategy.

Prior to the legislation, some programmers and operators entered into contracts explicitly providing for the exclusive carriage of such programming. Because of the reliance by these parties on the then existing state of the law, such contracts should be viewed as not unreasonable unless proven otherwise.

(b) A national cable programmer owned or controlled by a cable operator shall make programming available on similar terms to all cable systems, provided, however, that reasonable cost-related conditions and certain other reasonable requirements can be imposed.

(c) No cable operator may discriminate against any unaffiliated programmer with regard to carriage, channel and tier placement, marketing support, affiliate fees for comparable programming, or other practices, if such practices would impede retail competition. No cable operator may require a financial interest from a programmer as a condition of carriage.

(d) The FCC shall prescribe rules to implement this section, including rules for expedited review of complaints made pursuant to this section.

(e) Any programmer who scrambles satellite (C-Band) cable programming for private viewing shall make that programming available for private viewing by home satellite dish owners.

SECTION 7.—LEASED COMMERCIAL ACCESS

This section amends section 612 of the Act:

(a) A new clause is added to the purposes section of section 612(a), to provide that the purpose of this section is also "to promote competition in the delivery of diverse sources of video programming".

(b) This subsection amends section 612(c) to require the FCC to establish the maximum reasonable rates and reasonable terms and conditions for use of these commercial access channels and for the billing of rates to subscribers and for the collection of revenue from subscribers by the cable operator for such use.

As with the rate regulation section, the Commission is given broad discretion in establishing the maximum reasonable rates and reasonable terms and conditions. The Commission should examine any existing lease arrangements as indicators of the cost of carriage. The Commission should also consider other evidence of this cost and the cost of billing and collection. As for terms and conditions, if programmers using these channels are placed on tiers that few subscribers access, the purpose of this provision is defeated. The Commission should ensure that these programmers are carried on channel locations that most subscribers actually use, while also considering the legitimate need of the cable operator to market the product. The Committee reaffirms the importance of this provision, and it is vital that the Commission use its authority to ensure that these channels are a genuine outlet for programmers.

SECTION 8.—LIMITATIONS ON CONTROL AND UTILIZATION

This section amends section 613(f) of the Act, as follows:

Paragraph (1) requires the FCC to establish reasonable limits on (A) the number of cable subscribers that any one person may serve through cable systems owned by that person or in which that person has an attributable interest; and (B) the number of channels that can be occupied by a programmer in which a cable operator has an attributable interest.

The Commission is given discretion in establishing the reasonable limits on horizontal and vertical integration; however, the legislation is clear that the Commission must adopt some limitations. The Committee believes it has given the Commission enough direction in the legislation to strike the proper balance. The Committee will therefore permit the Commission to work its will in establishing limits that best serve the public interest, and the Committee then will review this decision. Because these markets are dynamic, the Commission should revisit these limitations at appropriate times to ensure they accurately reflect the policies of the legislation.

In determining what is an attributable interest, it is the intent of the Committee that the FCC use the attribution criteria set forth in 47 C.F.R. section 73.3555 (notes) or other criteria the FCC may deem appropriate.

The subsection on vertical integration is akin to the FCC's one-to-a-market requirement in broadcasting.[161] It is designed to increase the diversity of voices available to the public. Some MSOs own many programming services. It would be unreasonable for them to occupy a large percentage of channels on a cable system.

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[161] FCC Rule 73.3555.

The intent of this provision is to place reasonable limits on the number of channels that can be occupied by each MSO's programming services. For example, the FCC may conclude that each MSO should control no more than 20 percent of the channels on any cable system, with a minimum of six channels being permissible. The FCC should establish these rules based on the number of activated channels less the number of over-the-air broadcast signals carried and the number of public, educational, and governmental (PEG) and leased access channels carried. On a system with 54 channels, 14 of which are occupied by over-the-air signals or access channels, the limit then would be eight channels that could be occupied by programming owned by an MSO or in which the MSO has an attributable interest. The programming of each other MSO could also occupy eight channels.

Paragraph (2) requires that the FCC, in establishing reasonable limitations pursuant to paragraph (1), shall, among other public interest objectives—

> (A) ensure that cable operators do not impede the flow of video programming to the consumer;
>
> (B) ensure that cable operators do not favor their own programming or unreasonably restrict the flow of such programming to other video distributors;
>
> (C) take particular account of the market structure, ownership patterns, or other relationships of the cable industry, including the nature and market power of the local franchise, the joint ownership of cable systems and video programmers, and the various types of non-equity controlling interests;
>
> (D) take account of any efficiencies and other benefits gained through integration;
>
> (E) ensure that its rules reflect the dynamic nature of the communications marketplace;
>
> (F) not impose barriers to service in rural areas that do not now have service; and
>
> (G) not impose limitations which would impair the development of diverse and high quality video programming.

SECTION 9.—CROSSOWNERSHIP

The legislation amends section 613(a) of the Act by adding a new paragraph (2) which prohibits a cable operator from owning a multichannel multipoint distribution system or a satellite master antenna television service in the same areas in which the operator holds a franchise for a cable system.

The Committee does not intend for this prohibition to apply to common ownership of an SMATV system that qualifies as a "cable system" under section 602(6) of the Act and a stand-alone SMATV system.

Subparagraph (A) of new paragraph (2) leaves in effect all existing MMDS and SMATV systems owned by cable systems on the date of enactment.

Subparagraph (B) of new paragraph (2) gives the FCC the authority to grant waivers of the provision where it is necessary to ensure that residents in the cable community receive the cable operator's programming.

The legislation amends section 613(c) by adding a new subsection (c)(2), which provides:

If ten percent of the households in the United States with television sets subscribe to multichannel programming services provided via satellite (regardless of frequency band) directly to home satellite antennae, the FCC shall promulgate appropriate regulations (A) limiting ownership of any distributor of such directly-to-home satellite service by cable operators and other persons having media interests, and (B) requiring access to consumers through such service by programmers not owned or controlled by any distributor of such service.

SECTION 10.—CUSTOMER SERVICE

The legislation amends section 632 of the Act, as follows:

(a) Subsection (a) is amended to prohibit a franchising authority from adopting laws or regulations inconsistent with subsection (d).

(b)(1) Subsection (d) is amended to require the FCC, within 180 days, (A) to determine whether the industry has established customer service standards that are sufficient to ensure that consumers are fairly served, and (B) if so, regularly to monitor and review the industry's performance to ensure that the industry standards continue to be effective.

(2) If the FCC determines that the industry standards are inadequate to ensure that customers are fairly served, it shall adopt its own standards. If the Commission adopts its own standards, it shall take into account differences in the cable community. The Commission shall regularly review the standards to ensure that customers are fairly served.

(3) This provision shall not preempt any State laws in effect on June 7, 1990, concerning customer service.

SECTION 11.—FRANCHISE RENEWAL

(a) This section amends section 626 of the Act to state that the submission of a timely notice of renewal by a cable operator initiates the renewal process provided for in the Act in cases in which a franchising authority needs to conduct only one proceeding under this section for all applicable franchises issued.

(b) This section clarifies that the franchising authority has a full six months in which to complete its proceedings, unless the period is extended by mutual agreement. This provision is not intended to limit the flexibility of a franchising authority to determine when to initiate proceedings under this section.

(c) This section clarifies further the timing of the proceeding.

(d) This section clarifies that the franchising authority can revoke a cable operator's franchise for cause at any time.

SECTION 12.—REQUIREMENT FOR CERTAIN EQUIPMENT ON TELEVISION SETS

This section gives the FCC the authority to require that television sets have electronic switches permitting users to change readily among video distributors, provided that the FCC determines that such switches are technically and economically feasible.

SECTION 13.—LIMITATION OF FRANCHISING AUTHORITY LIABILITY

This section amends Part III of title VI of the Act to include section 628, which exempts local franchising authorities from liability for damages (except for attorneys' fees and legal costs) in cases where the franchising authorities are charged with violating a cable operator's First Amendment rights. This provision does not apply to cases where a franchising authority has been found to have violated a cable operator's First Amendment rights and repeats or continues the violation.

SECTION 14.—MINIMUM TECHNICAL STANDARDS

This section amends section 624 of the Act to add the following provisions:

(e)(1) within one year after the date of enactment, the Commission shall establish minimum technical standards to ensure adequate signal quality;

(2) the Commission may establish standards for technical operation of cable systems and for any other video signals, including HDTV;

(3) the Commission may require compliance with and enforce the technical standards;

(4) the Commission shall establish procedures for complaints asserting violations of the technical standards against cable operators, but this legislation does not preclude remedies permitted under the franchise agreement or Federal or local law; and

(5) the establishment and enforcement of any technical standards other than those adopted by the Commission are preempted.

SECTION 15.—REQUIREMENT TO CARRY LOCAL BROADCAST SIGNALS

This provision adds a new section (614) to the Act, as follows:

(a) Each cable operator that relies upon compulsory licensing pursuant to section 111 of title 17, U.S.C., for secondary transmissions by its cable system shall carry the signals of qualified local broadcast stations in accordance with the provisions of this section.

(b)(1) A participating operator of a cable system with 12 or fewer usable activated channels shall carry at least 3 qualified broadcast stations.

(2) A participating operator with more than 12 and fewer than 125 usable activated channels shall carry the specific number of qualified broadcast stations set forth in this provision, approximately one-third of the usable activated channels.

(3) A participating operation with more than 125 usable activated channels shall carry the number of signals of qualified local broadcast stations that is equal to one-third of the aggregate number of usable activated channels of such systems.

(c) Among the signals of qualified local broadcast stations which a participating operator of a cable system is required to carry are: (1) the signal of at least 1 qualified noncommercial educational television station or translator for systems with fewer than 54 usable activated channels; and (2) the signals of at least 2 qualified noncommercial educational television stations or translators for systems with more than 54 usable activated channels.

(d)(1) Whenever the number of qualified local broadcast stations exceeds the minimum number a participating operator is required to carry under this section, such operator shall have discretion in selecting the signals to be carried; except that (A) carriage pursuant to subsection (c) is nondiscretionary, and (B) if a broadcast network entity is selected, it shall be the entity whose city of license reference point is closest to the principal headend of the cable system. The carriage of each qualified local broadcast station shall be included in determining compliance with this section even if the signal of one station substantially duplicates that of another. For purposes of this section, the term "broadcast network entity" means an organization which produces programs available for simultaneous transmission by 10 or more affiliated broadcast stations and which has local distribution or circuits available to such affiliated stations at least 12 hours each day.

(2) each signal carried pursuant to obligations and requirements of this section shall be carried on the cable system channel number on which the qualified local broadcast station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, at the election of the broadcaster, or on such other channel number as mutually agreed upon by the broadcaster and participating operator. Any disputes shall be resolved by the franchising authority.

(3) A participating operator shall carry in its entirety the primary video and accompanying audio transmission of each qualified local broadcast station. Retransmission of material in the video blanking interval or other enhancements shall be within the discretion of the participating operator.

(4) The signals carried pursuant to this section shall be carried without material degradation.

(5) A participating operator shall have no obligation to carry the signal of any qualified local broadcast station that substantially duplicates that of another that is carried.

(6) Signals carried pursuant to this section shall be available on the lowest priced tier of service separately available to each subscriber to which subscription is required for access to all other tiers of service. Such signals shall be viewable via cable on all television receivers of a subscriber connected to a cable system. If a participating operator authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections or with the equipment or materials for such connections, the operator shall notify such subscribers in writing of all broadcast stations within 50 miles of the principal headend of the cable system that are not available without a cable converter box and shall offer to sell or lease such converter box.

(7) A participating operator shall identify, upon request by any person, those signals carried in fulfillment of the signal carriage obligations of this section.

(8) A participating operator shall provide written notice to a qualified local broadcast station, the relevant franchising authority, and subscribers at least 30 days prior to changing the carriage of a qualified local broadcast station. No such change shall occur during the sweeps period in which major television rating services

measure the audience size. However, the broadcaster, pursuant to subsection (d)(2), may select a channel number.

(9) A participating operator shall not accept monetary payment or other valuable consideration in exchange for carriage of any qualified local broadcast station carried pursuant to this section, except that any such station may be required to bear the cost associated with delivering a qualified signal to the cable headend.

(e)(1) The qualified local broadcast station may bring complaints about compliance with this section, other than subsection (d)(2), to the FCC. Any such complaint shall allege the nature of the noncompliance as well as the basis for the allegations.

(2) The Commission shall afford the participating operator an opportunity to present its case supporting compliance.

(3) Within 120 days after the complaint is filed, the Commission shall rule on the complaint. If the Commission rules against the participating operator, it shall state with particularity the basis for such findings and order the operator to take such remedial action as is necessary. If the Commission rules in favor of the participating operator, it shall dismiss the complaint.

SECTION 16.—JUDICIAL REVIEW

This provision amends section 635 of the Act by adding at the end a new subsection:

(c)(1) Any civil action challenging the constitutionality of section 614 (Carriage of Local Broadcast Signals) shall be heard by a district court of three judges convened pursuant to the provisions of section 2284 of title 28, U.S. Code.

(2) An interlocutory or final judgment, decree, or order of the court of three judges under paragraph (1) holding section 614 unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order.

SECTION 17.—HOME WIRING

This provision adds a new subscription at the end of section 624:

(g) Within 120 days after the date of enactment, the FCC shall prescribe rules concerning the disposition of cable-installed wires within the home when the subscriber terminates service.

SECTION 18.—SEPARABILITY

If any provision of this Act, or application of such provision to any person or circumstances, shall be held invalid, the remainder of this Act, or the application as to which it is held invalid, shall not be affected thereby.

SECTION 19.—EFFECTIVE DATE

Except as otherwise specified in this Act, the requirements of this Act shall be effective 60 days after the date of enactment of this Act. The FCC may promulgate such regulations as it determines necessary to interpret such requirements that are not inconsistent with this Act.

ROLLCALL VOTES IN COMMITTEE

In accordance with paragraph 7(c) of rule XXVI of the Standing Rules of the Senate, the Committee provides the following description of the record votes during its consideration of S. 1880:

At the close of debate on S. 1880, after consideration and acceptance of the proposed Committee substitute and several amendments to the substitute, the Committee ordered the bill as amended favorably reported, on a rollcall vote of 18 yeas and 1 nay as follows:

YEAS—18

Mr. Hollings
Mr. Inouye
Mr. Ford
Mr. Exon
Mr. Gore
Mr. Rockefeller
Mr. Bentsen [1]
Mr. Kerry
Mr. Breaux
Mr. Bryan
Mr. Danforth
Mr. Pressler
Mr. Stevens [1]
Mr. Kasten
Mr. McCain [1]
Mr. Burns
Mr. Gorton
Mr. Lott

NAYS—1

Mr. Packwood [1]

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[1] By proxy.

ADDITIONAL VIEWS OF MESSRS. GORE AND FORD

Despite more than a year of debate, numerous Congressional hearings, and the introduction of dozens of bills in both houses, distortions in the cable television marketplace continue. S. 1880 is a modest solution to a variety of problems facing consumers of cable television services.

The bill is the product of extraordinary cooperation between majority and minority members and staff. Since discussions began, the different parties have walked a tightrope between consumer protection and burdensome re-regulation, and between enhanced competition and marketplace intervention.

While the rate regulation provisions of S. 1880 deal with the most immediate problem of unprecedented cable rate increases, rate regulation is certainly not the only way to remedy problems in this marketplace. When we introduced the original cable legislation, S. 1068, early in the 101st Congress, we made a special effort to provide incentives for competition to local cable operators as the preferred path to a fair marketplace for cable consumers, especially those dependent upon home satellite receivers as their only access to mass media programming. To that effect, S. 1880 as reported by this Committee goes a long way toward that goal.

Under the Committee bill, cable programmers may no longer "unreasonably" discriminate against competing forms of program distribution, such as home satellite receivers and wireless cable. In addition, through the adoption of an amendment to the staff draft during the Committee executive session, the Committee specifically extended this protection against discrimination to future direct broadcast satellite (DBS) distribution. Such assurances are critical to the evolution of this new technology and to the prosects of better video programming access for families everywhere, whether they live in a cable-served area or not.

During the executive session on S. 1880 the Committee considered a draft finding which created the impression that exclusive distribution agreements between programmers and cable operators may be used to exclude competing technologies, thus diminishing the potential benefits of competition. The Committee adopted an amendment striking that finding, eliminating the confusion created in the draft language.

Finally, the Committee-adopted amendment expressly extended a "right of access" to owners of private C-Band home satellite receivers for services of non-affiliated programmers. The intention of that amendment was to assure those families who have invested thousands in current home satellite receiver technology that no programming services would be denied to them. The markup draft provided such protection for services of affiliated (owned in whole or part by cable systems) programmers. The amendment ensured that non-affiliated services will also continue to be made available.

The bill is a compromise between the many competing interests in the video programming marketplace and, as such, is not perfect. Since the executive session cable consumers have reported instances of cable operators shifting otherwise free, over-the-air broadcast signals to a new tier, and charging unreasonably high rates to force consumers to the higher tier. When the Senate takes up S. 1880, it must close a loophole which makes possible this unreasonable pricing of "retiered" services.

CHANGES IN EXISTING LAW

In compliance with paragraph 12 of rule XXVI of the Standing Rules of the Senate, changes in existing law made by the bill, as reported, are shown as follows (existing law proposed to be omitted is enclosed in black brackets, new material is printed in italic, existing law in which no change is proposed is shown in roman):

COMMUNICATIONS ACT OF 1934

Section 303 of that Act

GENERAL POWERS OF COMMISSION

SEC. 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall—

(a) through (r) * * *

(s) Have authority to require that apparatus designed to receive television pictures broadcast simultaneously with sound be capable of adequately receiving all frequencies allocated by the Commission to television broadcasting, *and be equipped with an electronic switch permitting users of the apparatus to change readily among all video distribution media,* when such apparatus is shipped in interstate commerce, or is imported from any foreign country into the United States, for sale or resale to the public, *except that such electronic switch shall be required only if the Commission determines that the installation of the switch is technically and economically feasible.*

(t) * * *

Title VI of that Act

TITLE VI—CABLE COMMUNICATIONS

PART I—GENERAL PROVISIONS

PURPOSES

SEC. 601. * * *

DEFINITIONS

SEC. 602. For purposes of this title—

(1) the term "activated channels" means those channels engineered at the headend of a cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, incuding any channel designated for public, educational, or governmental use;

[(1)**]** *(2)* the term "affiliate"; when used in relation to any person, means another person who owns or controls, is owned or controlled by, or is under common ownership or control with, such person;

(3) the term "available to a household" or "available to a home" when used in reference to a multichannel video programming distributor means a particular household which is a subscriber or customer of the distributor or a particular household which is actively and currently sought as a subscriber or customer by a multichannel video programming distributor;

[(2)**]** *(4)* the term "basic cable service" means any service tier which includes the retransmission of local television broadcast signals;

[(3)**]** *(5)* the terms "cable channel" or "channel" means a portion of the electromagnetic frequency specturm which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation);

(6) the term "cable community" means the households in the geographic area in which a cable system provides cable service;

[(4)**]** *(7)* the term "cable operator" means any person or group of persons (A) who provides cable service over a cable system and directly or through one or more affiliates owns a significant interest in such cable system, or (B) who otherwise controls or is responsible for, through any arrangement, the management and operation of such a cable system;

[(5)**]** *(8)* the term "cable service" means—

(A) the one-way transmission to subscribers of (i) video programming, or (ii) other programming service, and

(B) subscriber interaction, if any, which is required for the selection of such video programming or other programming service;

[(6)**]** *(9)* the term "cable system" means a facility, consisting of a set of closed transmission paths and associated signal generation, reception, and control equipment that is designed to provide cable service which includes video programming and which is provided to multiple subscribers within a community, but such term does not include (A) a facility that serves only to retransmit the television signals of 1 or more television broadcast stations; (B) a facility that serves only subscribers in 1 or more multiple unit dwellings under common ownership, control, or management, unless such facility or facilities uses any public right-of-way; (C) a facility of a common carrier which is subject, in whole or in part, to the provisions of title II of this Act, except that such facility shall be considered a cable system (other than for purposes of section 621(c)) to the extent such facility is used in the transmission of video programming directly to subscribers; or (D) any facilities of any electric utility used solely for operating its electric utility systems;

[(7)**]** *(10)* the term "Federal agency" means any agency of the United States, including the Commission;

[(8)**]** *(11)* the term "franchise" means an initial authorization, or renewal thereof (including a renewal of an authorization which has been granted subject to section 626), issued by a franchising authority, whether such authorization is designated as a franchise, permit, license, resolution, contract, certificate, agreement, or otherwise, which authorizes the construction or operation of a cable system;

[(9)] *(12)* the term "franchising authority" means any governmental entity empowered by Federal, State, or local law to grant a franchise;

[(10)] *(13)* the term "grade B contour" means the field strength of a television broadcast station computed in accordance with regulations promulgated by the Commission;

(14) the term "headend" means the location of any equipment of a cable system used to process the signals of television broadcast stations for redistribution to subscribers;

(15) the term "multichannel video programming distributor" means a person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming;

[(11)] *(16)* the term "other programming service" means information that a cable operator makes available to all subscribers generally;

[(12)] *(17)* the term "person" means an individual, partnership, association, joint stock company, trust, corporation, or governmental entity;

(18) the term "principal headend" means—

(A) the headend, in the case of a cable system with a single headend, or

(B) in the case of a cable system with more than one headend, the headend designated by the participating operator as the principal headend, except that such designation shall not undermine or evade the requirements of section 614;

[(13)] *(19)* the term "public, educational, or governmental access facilities" means—

(A) channel capacity designated for public, educational, or governmental use; and

(B) facilities and equipment for the use of such channel capacity;

(20) the term "qualified commercial station" means any television broadcast station which is not a qualified noncommercial educational television station and which is determined by the Commission to be a commercial station; such term shall not include low-power television stations, television translator stations, and other passive repeaters which operate pursuant to part 74 of title 47, code of Federal Regulations, or any successor regulations thereto;

(21) the term "qualified local broadcast station" means any television broadcast station licensed and operating on a channel regularly assigned to its community by the Commission (except where such station would be considered a distant signal under section 111 of title 17, United States Code) that, with respect to a particular cable system—

(A) is licensed to a community whose reference point, as defined in section 76.53 of title 47, Code of Federal Regulations, or any successor regulations thereto, is within 50 miles of the principal headend of the cable system, and which delivers to the cable system principal headend either a signal level of -45 dBm for UHF signals and -49 dBm for VHF signals at the input terminals of the signal processing equipment, or a baseband video signal, and

(B) is either a qualified commercial station or a qualified noncommercial educational television station;

(22) the term "qualified noncommercial educational television station" means any television broadcast station which—

(A) under the rules and regulation of the Commission is eligible to be licensed by the Commission as a noncommercial educational television broadcast station and which is owned and operated by a public agency or nonprofit private foundation, corporation, or association; or

(B) is owned or operated by a municipality and transmits only noncommercial programs for educational purposes;

such term includes (i) the translator of any noncommercial educational television station with five watts or higher power serving the cable community, (ii) a full service station or translator if such station or translator is licensed to a channel reserved for noncommercial educational use pursuant to section 73.606 of title 47, Code of Federal Regulations, or any successor regulations thereto, and (iii) such stations and translators operating on channels not so reserved as the Commission determines are qualified as noncommercial educational stations;

[(14)**]** *(23)* the term "service tier" means a category of cable service or other services provided by a cable operator and for which a separate rate is charged by the cable operator;

[(15)**]** *(24)* the term "State" means any State, or political subdivision, or agency thereof; **[**and**]**

(25) the term "usable activated channels" means activated channels of a cable system, except those channels whose use for the distribution of broadcast signals would conflict with technical and safety regulations as determined by the Commission;

(26) the term "video programmer" means a person engaged in the production, creation, or wholesale distribution of a video programming service for sale; and

[(16)**]** *(27)* the term "video programming" means programming provided by, or generally considered comparable to programming provided by, a television broadcast station.

Part II—Use of Cable Channels and Cable Ownership Restrictions

CABLE CHANNELS FOR PUBLIC, EDUCATIONAL, OR GOVERNMENTAL USE

Sec. 611. * * *

CABLE CHANNELS FOR COMMERCIAL USE

Sec. 612 (a) The purpose of this section is *to promote competition in the delivery of diverse sources of video programming and* to assure that the widest possible diversity of information sources are made available to the public from cable systems in a manner consistent with growth and development of cable systems.

(b)(1) * * *

(2) through (4) * * *

[(5) For the purposes of this section—

[(A) the term "activated channels" means those channels engineered at the headend of the cable system for the provision of services generally available to residential subscribers of the cable system, regardless of whether such services actually are provided, including any channel designated for public, educational, or governmental use; and

[(B) the term "commercial use" means the provision of video programming, whether or not for profit.]

(5) For the purposes of this section, the term "commercial use" means the provision of video programming, whether or not for profit.

(6) * * *

(c)(1) If a person unaffiliated with the cable operator seeks to use channel capacity designated pursuant to subsection (b) for commercial use, the cable operator shall establish, consistent with the purpose of this section *and with rules prescribed by the Commission under paragraph (4)*, the price, terms, and conditions of such use which are at least sufficient to assure the such use will not adversely affect the operation, financial condition, or market development of the cable system.

(2) through (3) * * *

(4)(A) The Commission shall have the authority to—

(i) determine the maximum reasonable rates that a cable operator may establish pursuant to paragraph (1) for commercial use of designated channel capacity, including the rate charged for the billing of rates to subscribers and for the collection of revenue from subscribers by the cable operator for such use; and

(ii) establish reasonable terms and conditions for such use, including those for billing and collection.

(B) Within 180 days after the date of enactment of this paragraph, the Commission shall establish rules for determining the maximum reasonable rate under subparagraph (A)(i) and for establishing terms and conditions under subparagraph (A)(ii).

(d) through (h) * * *

OWNERSHIP RESTRICTIONS

SEC. 613. (a)*(1)* It shall be unlawful for any person to be a cable operator if such person, directly or through 1 or more affiliates, owns or controls, the licensee of a television broadcast station and the predicted grade B contour of such station covers any portion of the community served by such operator's cable system.

(2) It shall be unlawful for a cable operator to hold a license for multichannel multipoint distribution service, or to offer satellite master antenna television service separate and apart from any franchised cable service, in any portion of the cable community served by that cable operator's cable system. The Commission—

(A) shall waive the requirements of this paragraph for all existing multichannel multipoint distribution services and satellite master antenna television services which are owned by a cable operator on the date of enactment of this paragraph; and

(B) may waive the requirements of this paragraph to the extent the Commission determines is necessary to ensure that all significant portions of the affected cable community are able to obtain video programming.

(b) * * *

(c)*(1)* The Commission may prescribe rules with respect to the ownership or control of cable systems by persons who own or control other media of mass communications which serve the same community served by a cable system.

(2) If ten percent of the households in the United States with television sets subscribe to service provided by multichannel video programming distributors directly via satellite to home satellite antennae, the Commission shall promulgate appropriate regulations (A) limiting ownership of any such distributor by cable operators or any person having other media interests and (B) requiring access to such satellite service by unaffiliated video programmers.

(d) through (e) * * *

[(f) This section shall not apply to prohibit any combination of any interests held by any person on July 1, 1984, to the extent of the interests so held as of such date, if the holding of such interests was not inconsistent with any applicable Federal or State law or regulations in effect on that date.]

(f)(1) In order to enhance effective competition, the Commission shall, within one year after the date of enactment of the Cable Television Consumer Protection Act of 1990, conduct a rulemaking proceeding to prescribe rules and regulations establishing—

(A) reasonable limits on the number of cable subscribers a person is authorized to reach through cable systems owned by such person, or in which such person has an attributable interest; and

(B) reasonable limits on the number of channels on a cable system that can be occupied by a video programmer in which a cable operator has an attributable interest.

(2) In prescribing rules and regulations under paragraph (1), the Commission shall, among other public interest objectives—

(A) ensure that no cable operator or group of cable operators can unfairly impede, either because of the size of any individual operator or because of joint actions by a group of operators of sufficient size, the flow of video programming from the video programmer to the consumer;

(B) ensure that cable operators affiliated with video programmers do not favor such programmers in determining carriage on their cable systems or do not unreasonably restrict the flow of such progamming to other video distributors;

(C) take particular account of the market structure, ownership patterns, and other relationships of the cable television industry, including the nature and market power of the local franchise, the joint ownership of cable systems and video programmers, and the various types of non-equity controlling interests;

(D) account for any efficiencies and other benefits that might be gained through increased ownership or control;

(E) make sure rules and regulations reflect the dynamic nature of the communications marketplace;

(F) not impose limitations which would bar cable operators from serving previously unserved rural areas; and

(G) not impose limitations which would impair the development of diverse and high quality video programming.

(g) * * *

CARRIAGE OF LOCAL BROADCAST SIGNALS

SEC. 614. (a) Each cable operator that relies upon compulsory licensing pursuant to section 111 of title 17, United States Code, for secondary transmissions by its cable system (hereafter in this section referred to as a "participating operator") shall carry the signals of qualified local broadcast stations in accordance with the provisions of this section.

(b)(1) A participating operator of a cable system with 12 or fewer usable activated channels shall carry the signals of a minimum of three qualified local broadcast stations.

(2) A participating operator of a cable system with more than 12 and fewer than 125 usable activated channels shall carry the signals of qualified local broadcast stations as follows:

Number of cable channels	*Number of TV signals*
13 to 20	*4*
21 to 29	*7*
30 to 33	*10*
34 to 37	*11*
38 to 41	*13*
42 to 45	*14*
46 to 49	*15*
50 to 53	*17*
54 to 57	*18*
58 to 61	*19*
62 to 65	*21*
66 to 69	*22*
70 to 73	*23*
74 to 77	*25*
78 to 81	*26*
82 to 85	*27*
86 to 89	*29*
90 to 93	*30*
94 to 97	*31*
98 to 101	*33*
102 to 105	*34*
106 to 109	*35*
110 to 113	*37*
114 to 117	*38*
118 to 121	*39*
122 to 125	*41*

(3) A participating operator of a cable system with more than 125 usable activated channels shall carry the number of signals of qualified local broadcast stations that is equal to one-third of the aggregate number of usable activated channels of such system.

(c) Among the signals of qualified local broadcast stations which a participating operator of a cable system is required to carry under this section—

(1) the signal of at least one qualified noncommercial educational television station or translator shall be carried by a participating operator of a cable system with fewer than 54 usable activated channels; and

(2) the signals of at least two qualified noncommercial educational television stations or translators shall be carried by a participating operator of a cable system with 54 or more usable activated channels.

(d)(1) Whenever the number of qualified local broadcast stations exceeds the minimum number of signals of such stations that a participating operator of a cable system is required to carry under this section, the participating operator shall have discretion in selecting which signals shall be carried on its cable system in order to meet the carriage requirements of this section; except that (A) carriage of qualified noncommercial educational television station signals pursuant to subsection (c) is nondiscretionary and (B) if the participating operator elects to carry an affiliate of a broadcast network entity, such operator shall carry the affiliate of such broadcast network entity whose city of license reference point, as defined in section 76.53 of title 47, Code of Federal Regulations, or any successor regulations thereto, is closest to the principal headend of the cable system. The carriage of each signal of a qualified local broadcast station shall be included in determining whether a participating operator of a cable system has complied with the requirements of this section, even if the signal of one such station substantially duplicates that of another station. For purposes of this paragraph, the term 'broadcast network entity' means an organization which produces programs available for simultaneous transmission by 10 or more affiliated broadcast stations and which has distribution locality or circuits available to such affiliated stations at least 12 hours each day.

(2) Each signal carried in fulfillment of carriage obligations of a participating operator of a cable system under this section shall be carried on the cable system channel number on which the qualified local broadcast station is broadcast over the air, or on the channel on which it was carried on July 19, 1985, at the election of the broadcaster, or on such other channel number as mutually agreed upon by the broadcaster and the participating operator. Any disputes regarding the positioning of a qualified local broadcast station shall be resolved by the franchising authority.

(3) A participating operator of a cable system shall carry in its entirety the primary video and accompanying audio transmission of each of the qualified local broadcast stations the operator selects to carry in accordance with this section. Retransmission of material in the vertical blanking interval or other enhancements of the primary video and audio signal (including multi-channel sound, teletext, and materials carried on subcarriers) shall be within the discretion of the participating operator.

(4) The signals of a qualified local broadcast station that are carried on the cable system of a participating operator shall be carried without material degradation.

(5) A participating operator of a cable system shall not be required to carry the signal of any qualified local broadcast station that sub-

stantially duplicates the signal of another qualified local broadcast station that is carried by the operator.

(6) Signals carried in fulfillment of carriage obligations of a participating operator under this section shall be available on the lowest priced tier of service separately available to each cable subscriber to which subscription is required for access to all other tiers of service. Such signals shall be viewable via cable on all television receivers of a subscriber connected to a cable system by a cable operator. If a participating operator of a cable system authorizes subscribers to install additional receiver connections, but does not provide the subscriber with such connections, or with the equipment or materials for such connections, the operator shall notify such subscribers in writing of all broadcast stations within 50 miles of the principal headend of the cable system that are not available without a cable converter box and shall offer to sell or lease such a converter box to such subscribers.

(7) A participating operator shall identify, upon request by any person, those signals carried in fulfillment of the signal carriage obligations of the operator under this section.

(8) A participating operator of a cable system shall provide written notice to a qualified local broadcast station, the franchising authority of such cable system, and subscribers of such cable system at least 30 days prior to either deleting from carriage or repositioning the signal of a qualified local broadcast station. No such deletion or repositioning shall occur during a sweeps period in which major television rating services measure the size of audience of qualified local broadcast stations.

(9) A participating operator of a cable system shall not accept monetary payment or other valuable consideration in exchange for carriage of the signal of any qualified local broadcast station carried in fulfillment of signal carriage obligations of the operator under this section, except that any such station may be required to bear any cost associated with delivering to the headend of the cable system a signal of the quality defined in section 602(21).

(e)(1) Whenever a qualified local broadcast station believes that a participating operator of a cable system has failed to comply with the signal carriage requirements of this section, except requirements under subsection (d)(2) regarding station positioning, the station may file a complaint with the Commission. Such complaint shall allege the manner in which such cable system has failed to comply with such requirements and state the basis for such allegations.

(2) The Commission shall afford such participating operator an opportunity to present data, views, and arguments to establish that the operator has complied with signal carriage requirements of this section.

(3) Within 120 days after the date a complaint is filed under this subsection, the Commission shall determine whether the participating operator has complied with the requirements of this section. If the Commission determines that the participating operator has failed to comply with such requirements, the Commission shall state with particularity the basis for such findings and order the operator to take such remedial action as is necessary to meet such requirements. If the Commission determines that the participating operator

has fully complied with such requirements, the Commission shall dismiss the complaint.

PART III—FRANCHISING AND REGULATION

GENERAL FRANCHISE REQUIREMENTS

SEC. 621. * * *

FRANCHISE FEES

SEC. 622. * * *

[REGULATION OF RATES

[SEC. 623. (a) Any Federal agency or State may not regulate the rates for the provision of cable service except to the extent provided under this section. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section.

[(b)(1) Within 180 days after the date of the enactment of this title, the Commission shall prescribe and make effective regulations which authorize a franchising authority to regulate rates for the provision of basic cable service in circumstances in which a cable system is not subject to effective competition. Such regulations may apply to any franchise granted after the effective date of such regulations. Such regulations shall not apply to any rate while such rate is subject to the provisions of subsection 9(c).

[(2) For purposes of rate regulation under this subsection, such regulations shall—

[(A) define the circumstances in which a cable system is not subject to effective competition; and

[(B) establish standards for such rate regulation.

[(3) The Commission shall periodically review such regulations, taking into account developments in technology, and may amend such regulations, consistent with paragraphs (1) and (2), to the extent the Commission determines necessary.

[(c) In the case of any cable system for which a franchise has been granted on or before the effective date of this title, until the end of the 2-year period beginning on such effective date, the franchising authority may, to the extent provided in a franchise—

[(1) regulate the rates for the provision of basic cable service, including multiple tiers of basic cable service;

[(2) require the provision of any service tier provided without charge (disregarding any installation or rental charge for equipment necessary for receipt of such tier); or

[(3) regulate rates for the initial installation or the rental of 1 set of the minimum equipment which is necessary for the subscriber's receipt of basic cable service.

[(d) Any request for an increase in any rate regulated pursuant to subsection (b) or (c) for which final action is not taken within 180 days after receipt of such request by the franchising authority shall be deemed to be granted, unless the 180-day period is extended by mutual agreement of the cable operator and the franchising authority.

[(e)(1) In addition to any other rate increase which is subject to the approval of a franchising authority, any rate subject to regulation pursuant to this section may be increased after the effective date of this title at the discretion of the cable operator by an amount not to exceed 5 percent per year if the franchise (as in effect on the effective date of this title) does not specify a fixed rate or rates for basic cable service for a specified period or periods which would be exceeded if such increase took effect.

[(2) Nothing in this section shall be construed to limit provisions of a franchise which permits a cable operator to increase any rate at the operator's discretion; however, the aggregate increases per year allowed under paragraph (1) shall be reduced by the amount of any increase taken such year under such franchise provisions.

[(f) Nothing in this title shall be construed as prohibiting any Federal agency, State, or a franchising authority, from—

[(1) prohibiting discrimination among customers of basic cable service, or

[(2) requiring and regulating the installation or rental of equipment which facilitates the reception of basic cable service by hearing impaired individuals.

[(g) Any State law in existence on the effective date of this title which provides for any limitation or preemption of regulation by any franchising authority (or the State or any political subdivision or agency thereof) of rates for cable service shall remain in effect during the 2-year period beginning on such effective date, to the extent such law provides for such limitation or preemption. As used in this section, the term "State" has the meaning given it in section 3(v).

[(h) Not later than 6 years after that date of the enactment of this title, the Commission shall prepare and submit to the Congress a report regarding rate regulation of cable services, including such legislative recommendations as the Commission considers appropriate. Such report and recommendations shall be based on a study of such regulation which the Commission shall conduct regarding the effect of competition in the marketplace.]

REGULATION OF RATES

Sec. 623. (a) Any Federal agency, State, or franchising authority may not regulate the rates for the provision of cable service, or for the installation or rental of equipment used for the receipt of cable service, except to the extent provided under this section and section 612. Any franchising authority may regulate the rates for the provision of cable service, or any other communications service provided over a cable system to cable subscribers, but only to the extent provided under this section.

(b)(1) If the Commission finds that a cable system is not subject to effective competition, the Commission shall ensure that the rates for the provision of basic cable service, including for the installation or rental of equipment used for the receipt of basic cable service, are reasonable.

(2)(A) Upon written request by a franchising authority, the commission shall review the State and local laws and regulations governing the regulation of rates of cable systems under the jurisdiction

of such franchising authority. The Commission shall authorize such franchising authority to carry out such regulation pursuant to paragraph (1) in lieu of the Commission if the Commission finds that—

(i) such State and local laws and regulations conform to the procedures, standards, requirements, and guidelines prescribed under paragraph (4) and any interpretative rulings, decisions, and order of the Commission that relate to rate regulation under this subsection; and

(ii) such franchising authority will provide the level of protection to consumers required by the Commission and that carries out the national policy established in this title.

(B) Upon petition by a cable operator or other interested party, the Commission shall review such regulation of cable system rates by a franchising authority authorized under this paragraph. If the Commission finds that the franchising authority has acted inconsistently with the requirements in subparagraph (A), the Commission shall grant appropriate relief. If the Commission, after the franchising authority has had a reasonable opportunity to comment, determines that the State and local laws and regulations are not in conformance with subparagraph (A)(i) or (ii), the Commission shall revoke such authorization.

(3) A cable operator may add to or delete from a basic cable service tier any video programming other than retransmitted local television broadcast signals. Any obligation imposed by operation of law or contract inconsistent with this subsection is preempted and may not be enforced.

(4) Within 120 days after the date of enactment of the Cable Television Consumer Protection Act of 1990, the Commission shall prescribe by rule procedures, standards, requirements, and guidelines for the establishment of reasonable rates charged for basic cable service by a cable operator not subject to effective competition.

(5) A cable operator may file with the Commission, or with a franchising authority authorized by the Commission under paragraph (2) to regulate rates, a request for a rate increase in the price of a basic cable service tier. Any such request upon which final action is not taken within 180 days after such request shall be deemed granted.

(c)(1) When a franchising authority or a subscriber of any cable system found by the Commission not to be subject to effective competition files, within a reasonable time after a rate increase for cable programming service of that system, a complaint which establishes a prima facie case that rates for such cable programming service are significantly excessive based on the criteria established by the Commission, the Commission shall determine whether such rates for cable programming service are significantly excessive. In making its determination, the Commission shall inquire of the cable operator of such system as to the reasons for such rates. If the Commission finds that such rates cannot be justified under reasonable business practices, the Commission shall establish reasonable rates.

(2) Within 180 days after the date of enactment of the Cable Television Consumer Protection Act of 1990, the Commission shall prescribe by rule—

(A) the criteria for determining whether rates for cable programming service are significantly excessive, and

(B) criteria for determining that (i) a complaint described under paragraph (1) is filed within a reasonable period after a rate increase and (ii) the complaint properly establishes that rates for cable programming service are significantly excessive.

(3) In establishing the criteria for determining whether rates for cable programming service are significantly excessive pursuant to paragraph (2)(A), the Commission shall consider, among other factors—

(A) the extent to which service offerings are offered on an unbundled basis;

(B) rates for similarly situated cable systems offering comparable services, taking into account, among other factors, similarities in facilities, regulatory and governmental costs, and number of subscribers;

(C) the history of rates for such service offerings of the system; and

(D) the rates for all cable programming service offerings taken as a whole.

(d) Under this section, a cable system shall be presumed to be subject to effective competition if—

(1) fewer than 30 percent of the households in the cable community subscribe to the cable service of such cable system; or

(2) the cable community is served by a sufficient number of local television broadcast signals and by more than one multichannel video programming distributor.

For purposes of paragraph (2), a cable community shall be considered as served by more than one multichannel video programming distributor if (A) comparable video programming is available at comparable rates to at least a majority of the households in the cable community from a competing cable operator, multichannel multipoint distribution service, direct broadcast satellite program distributor, television receive-only satellite program distributor, or other competing multichannel video programming distributor, and (B) the number of households subscribing to programming services offered by such competing multichannel video programming distributor, or by a combination of such distributors, is in the aggregate at least 15 percent of the households in the cable community.

(e) Nothing in this title shall be construed as forbidding any Federal agency, State, or franchising authority from—

(1) prohibiting discrimination among customers of basic cable service; or

(2) requiring and regulating the installation or rental of equipment which facilitates the reception of basic cable service by hearing-impaired individuals.

(f) For purposes of this section, the term 'cable programming service' means all video programming services, regardless of service tier, offered over a cable system except basic cable service and those services offered on a per channel or per program basis.

REGULATION OF SERVICES, FACILITIES, AND EQUIPMENT

SEC. 624. (a) * * *

(b) through (d) * * *

[(e) The Commission may establish technical standards relating to the facilities and equipment of cable systems which a franchising authority may require in the franchise.]

(e)(1) The Commission shall, within one year after the date of enactment of the Cable Television Consumer Protection Act of 1990, establish minimum techncial standards to ensure adequate signal quality for all classes of video programming signals provided over a cable system, and thereafter shall periodically update such minimum standards to reflect improvements in technology.

(2) The Commission may establish standards for technical operation and other signals provided over a cable system including but not limited to high-definition television (HDTV).

(3) The Commission may require compliance with and enforce any standard established under this subsection, adjusted as appropriate for the particular circumstances of the local cable system and cable community.

(4) The Commission shall establish procedures for complaints or petitions asserting the failure of a cable operator to meet the technical standards and seeking an order compelling compliance; except that nothing in this subsection shall be construed to limit the ability of a complainant or petitioner to seek any other remedy that may be available under the franchise agreement or State or Federal law or regulation.

(5) After the establishment of technical standards by the Commission pursuant to this section, neither a State or political subdivision thereof, nor a franchising authority or other governmental entity of a State or political subdivision thereof, shall—

(A) establish any technical standards described in this subsection;

(B) enforce any such standards that have not been established by the Commission; or

(C) enforce any such standards that are inconsistent with the standards established by the Commission.

(F) * * *

(g) Within 120 days after the date of enactment of this subsection, the Commission shall prescribe rules and regulations concerning the disposition, after a subscriber to a cable system terminates service, of any cable installed by the cable operator within the premises of such subscriber.

MODIFICATION OF FRANCHISE OBLIGATIONS

SEC. 625. * * *

RENEWAL

SEC. 626. (a) During the 6-month period which begins with the 36th month before the franchise expiration, the franchising authority may on its own initiative, and shall at the request of the cable operator, commence proceedings which afford the public in the franchise area appropriate notice and participation for the purpose of—

(1) identifying the future cable-related community needs and interests; and

(2) reviewing the performance of the cable operator under the franchise during the then current franchise term.

Submission of a timely renewal notice by a cable operator pursuant to this subsection shall be sufficient to invoke the renewal process under this section.

(b)*(1) The franchising authority shall have a six-month period from the date the proceedings under subsection (a) are initiated to complete such proceedings, unless the period is extended by mutal agreement between the franchising authority and the cable operator.*

[(1)] *(2)* Upon completion of [a proceeding under subsection (a)] *the period referred to in paragraph (1),* a cable operator seeking renewal of a franchise may, on its own initiative or at the request of a franchising authority, submit a proposal for renewal.

[(2)] *(3)* Subject to section 624, any such proposal shall contain such material as the franchising authority may require, including proposals for an upgrade of the cable system.

[(3)] *(4)* The franchising authority may establish a *reasonable* date by which such proposal shall be submitted.

(c)(1) Upon [submittal] *submission* by a cable operator of a proposal to the franchising authority for the renewal of a franchise, the franchising authority shall provide prompt public notice of such proposal and, during the 4-month period [which begins on the completion of any proceedings under subsection (a)] *following submission of the proposal* renew the franchise or, issue a preliminary assessment that the franchise should not be renewed and, at the request of the operator or on its own initiative, commence an administrative proceeding, after providing prompt public notice of such proceeding, in accordance with paragraph (2) to consider whether—

(A) the cable operator has substantially complied with the material terms of the existing franchise and with applicable law;

(B) the quality of the operator's service, including signal quality, response to consumer complaints, and billing practices, but without regard to the mix, quality, or level of cable services or other services provided over the system, has been reasonable in light of community needs;

(C) the operator has the financial, legal, and technical ability to provide the services, facilities, and equipment as set forth in the operator's proposal; and

(D) the operator's proposal is reasonable to meet the future cable-related community needs and interests, taking into account the cost of meeting such needs and interests.

(2) through (3) * * *

(d) through (h) * * *

(i) Notwithstanding the provisions of subsections (a) through (h), any lawful action to revoke a cable operator's franchise for cause shall not be negated by the initiation of renewal proceedings by the cable operator under this section.

CONDITIONS OF SALE

SEC. 627. * * *

LIMITATION OF LIABILITY

SEC. 628. (a) In any claim under the Civil Rights Acts asserting a violation of First Amendment constitutional rights by a franchising authority or other governmental entity or by any official, member, employee, or agent of such authority or entity, arising from actions expressly authorized or required by this title, any relief shall be limited to injunctive relief, declaratory relief, and attorney's fees and legal costs, except as provided in subsection (b).

(b) The limitation required by subsection (a) shall not apply to actions that, prior to such violation, have been determined by a court of binding jurisdiction to be in violation of constitutional rights under the First Amendment or of the Civil Rights Acts.

PART IV—MISCELLANEOUS PROVISIONS

PROTECTION OF SUBSCRIBER PRIVACY

SEC. 631. * * *

CONSUMER PROTECTION

SEC. 632. (a) [A franchising] *To the extent not inconsistent with subsection (d), a franchising* authority may require, as part of a franchise (including a franchise renewal, subject to section 626), provisions for enforcement of—

(1) customer service requirements of the cable operator; and

(2) construction schedules and other construction-related requirements of the cable operator.

(b) through (c) * * *

(d)(1) The Commission shall, within 180 days after the date of enactment of this subsection, determine, after investigation—

(A) whether the cable industry has established industry standards for response by cable operators to the concerns of their customers; and

(B) if so, whether those standards are effective in ensuring that customers are fairly served.

If the Commission determines that such industry standards are effective in ensuring that customers are fairly served, the Commission shall thereafter regularly monitor and review the customer service performance of the industry to ensure that such industry standards continue to be effective.

(2) If, as a result of the investigation conducted pursuant to paragraph (1), the Commission determines that the cable industry has not established such industry standards that ensure that its customers are fairly served, the Commission shall, after notice and an opportunity for comment, promptly issue rules that establish customer service standards to accomplish such purpose. Thereafter the Commission shall regularly review the standards and make such modifications as may be necessary to ensure that customers of the cable industry are fairly served.

(3) Notwithstanding the provisions of subsection (a) and this subsection, nothing in this section shall be construed to prevent the enforcement of any State law concerning customer service in effect as of June 7, 1990.

UNAUTHORIZED RECEPTION OF CABLE SERVICE

SEC. 633. * * *

EQUAL EMPLOYMENT OPPORTUNITY

SEC. 634. * * *

JUDICIAL PROCEEDINGS

SEC. 635. (a) * * *

(b) * * *

(c)(1) Notwithstanding any other provision of law, any civil action challenging the constitutionality of section 614 of this Act or any provision thereof shall be heard by a district court of three judges convened pursuant to the provisions of section 2284 of title 28, United States Code.

(2) Notwithstanding any other provision of law, an interlocutory or final judgment, decree, or order of the court of three judges in an action under paragraph (1) holding section 614 of this Act or any provision thereof unconstitutional shall be reviewable as a matter of right by direct appeal to the Supreme Court. Any such appeal shall be filed not more than 20 days after entry of such judgment, decree, or order.

COORDINATION OF FEDERAL, STATE, AND LOCAL AUTHORITY

SEC. 636. * * *

EXISTING FRANCHISES

SEC. 637. * * *

CRIMINAL AND CIVIL LIABILITY

SEC. 638. * * *

OBSCENE PROGRAMMING

SEC. 639. * * *

NONDISCRIMINATION WITH RESPECT TO VIDEO PROGRAMMING

SEC. 640. (a) A video programmer in which a cable operator has an attributable interest and who licenses video programming for national distribution—

(1) shall not unreasonably refuse to deal with any multichannel video programming distributor;

(2) shall not discriminate in the price, terms, and conditions in the sale of the video programmer's programming among cable systems, cable operators, or other multichannel video programming distributors if such action would have the effect of impeding retail competition.

(b) A video programmer in which a cable operator has an attributable interest and who licenses video programming for national distribution shall make programming available on similar price, terms, and conditions to all cable systems, cable operators, or their agents or buying groups; provided however, that such video programmer may—

(1) impose reasonable requirements for creditworthiness, offering of service, and financial stability;

(2) establish different price, terms, and conditions to take into account differences in cost in the creation, sale, delivery, or transmission of video programming;

(3) establish price, terms, and conditions which take into account economies of scale or other cost savings reasonably attributable to the number of subscribers served by the distributor; and

(4) permit price differentials which are made in good faith to meet the equally low price of a competitor.

(c) No cable operator, cable system, or its affiliate may discriminate against any unaffiliated video programmer or require a financial interest in a video programmer or video programming service as a condition of carriage on a cable system.

(d) The Commission shall prescribe rules and regulations to implement this section. The Commission's rules shall—

(1) provide for an expedited review of any complaints made pursuant to this section; and

(2) provide for penalties to be assessed against any person filing a frivolous complaint pursuant to this section.

(e) Any person who encrypts any satellite cable programming for private viewing shall make such programming available for private viewing by C-band receive-only home satellite antenna users.

(f) This section shall not apply to the signal of an affiliate of a national television broadcast network or other television broadcast signal that is retransmitted by satellite and shall not apply to any internal satellite communication of any broadcaster, broadcast network, or cable network.

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